No. 01-1229-CSX Title: Pierce County, Washington, Petitioner
v.
Ignacio Guillen, Legal Guardian of Jennifer Guillen and Alma Guillen, Minors, et al.

Docketed:
February 25, 2002 Court: Supreme Court of Washington

Entry	Date	Proceedings and Orders
	Dec 17 2001	Application (01A452) for a stay the mandate pending the filing and disposition of a petiton for a writ of certiorari, submitted to Justice O'Connor.
	Dec 19 2001	(01A452)Justice O'Connor issued a temporary stay pending receipt of a response due on or before December 27, 2001.
	Dec 19 2001	Response to application (01A452) from Igancio Guillen, et al., requested by Justice O'Connor, due December 27, 2001.
	Dec 27 2001	Response to application (01A452) filed by Igancio Guillen, et al.,.
	Jan 2 2002	Application (01A452) granted by Justice O'Connor.
	Feb 22 2002	Petition for writ of certiorari filed. (Response due March 27, 2002)
	Feb 22 2002	Appendix of petitioner filed.
	Mar 21 2002	Motion of International Municipal Lawyers Association for leave to file a brief as amicus curiae filed.
	Mar 22 2002	Brief amicus curiae of Louisiana filed.
	Mar 27 2002	Motion of Association of American Railroads for leave to file a brief as amicus curiae filed.
	Mar 27 2002	Brief of respondents Robert and Luann Whitmer in opposition filed.
	Mar 27 2002	Brief of respondents Ignacio Guillen, et al. in opposition filed.
	Mar 27 2002	Brief amici curiae of Alaska, et al. filed.
	Apr 8 2002	Reply brief of petitioner Pierce County filed.
	Apr 10 2002	DISTRIBUTED for Conference of April 26, 2002
	Apr 29 2002	Motion of International Municipal Lawyers Association for leave to file a brief as amicus curiae GRANTED.
	Apr 29 2002	Motion of Association of American Railroads for leave to file a brief as amicus curiae GRANTED.
	Apr 29 2002	Petition GRANTED. SET FOR ARGUMENT November 4, 2002. **********
	May 10 2002	Motion of respondents Whitmer to determine party status filed.
	May 14 2002	Letter from counsel for Respondent Guillen received and distributed,
	May 14 2002	Opposition of petitioner to motion of respondents Whitmer filed.
	May 14 2002	Motion DISTRIBUTED. May 30, 2002 (Page 4)
	May 16 2002	Reply to response in opposition to Whitmer motion to determine party status filed and distributed.
	May 23 2002	Motion of the United States to intervene filed.
	Jun 3 2002	Motion of the United States to intervene GRANTED.
	Jun 3 2002	Motion of respondents Whitmer to determine party status

3 pp

Entry	Date	Proceedings and Orders
		GRANTED. and it is determined that the Whitmers are not parties under Rule 12.6, but they may file a brief as amici curiae.
	Jun 4 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including July 5, 2002.
	Jun 24 2002	Joint appendix filed.
	Jul 2 2002	Brief of petitioner Pierce County filed.
	Jul 3 2002	Brief amicus curiae of Association of American Railroads filed.
	Jul 3 2002	Brief amicus curiae of Louisiana filed.
	Jul 5 2002	Brief amici curiae of Washington, et al. filed.
	Jul 5 2002	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
	Jul 5 2002	Brief of the United States filed.
	Jul 5 2002	LODGING consisting of twenty one sets of three documents, 1. DOT 1996 Annual Report on Highway Safety Improvement Programs; 2. DOT Model Minimum Crash Criteria; 3. DOT State Crash Report Forms Catalog 1999, submitted by the Solicitor General.
	Jul 25 2002	Blanket consent to the filing of amicus briefs of certain listed amici received from counsel for the petitioners and counsel for the respondents.
	Jul 30 2002	Order extending time to file respondents' briefs on the merits to and including August 19, 2002.
	Aug 9 2002	Brief amicus curiae of Washington State Trial Lawyers Association Foundation filed.
	Aug 16 2002	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Aug 19 2002	Brief of respondents Ignacio Guillen, et al. filed.
	Aug 19 2002	Brief amici curiae of Law Professors Lynn Baker and Mitchell Berman filed.
	Aug 19 2002	Brief amici curiae of Robert and Luann Whitmer filed.
	Sep 3 2002	Motion of the Solicitor General for divided argument filed.
	Sep 6 2002	Application (02A204) of the United States for an extension of time within which to file the reply brief on the merits, submitted to Justice O'Connor.
	Sep 9 2002	Application (02A204) granted by Justice O'Connor extending the time to file until September 25, 2002.
	Sep 13 2002	Response in opposition to the Solicitor General's motion for divided argument filed by respondents.
	Sep 16 2002	Response of petitioner to the motion of the Solicitor General for divided argument filed. DISTRIBUTED.
	Sep 18 2002	Reply brief of petitioner Pierce County filed.
	Sep 24 2002	CIRCULATED.
	Sep 25 2002	X Reply brief of the United States on the merits filed.
	Sep 25 2002	LODGING consisting of ten unbound copies of DOT State Crash Report Forms Catalog 1995 update,received from counselor for the petitioner and distributed.
	Oct 7 2002	Motion of the Solicitor General for divided argument

Entry	Date	Proceedings and Orders
		GRANTED.
	Nov 4 2002	ARGUED.

Supreme Court, U.S.
FILED

NO. 01 1229 FEB 22 2002

OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 2001

PIERCE COUNTY,
Petitioner/Defendant,

v.

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,
Respondents/Plaintiffs

On Petition for Writ of Certiorari
To the Supreme Court of the State of Washington

PETITION FOR WRIT OF CERTIORARI

GERALD A. HORNE
Pierce County Prosecuting Attorney
By
DANIEL R. HAMILTON
and SUSAN JENSEN
Deputy Prosecuting Attorneys
Attorneys for Petitioner
955 Tacoma Ave. S., Suite 301
Tacoma, WA 98402
PH: (253) 798-7746

4398

QUESTIONS PRESENTED FOR REVIEW

1. Whether 23 U.S.C. §409, which protects certain documents "compiled or collected" in connection with certain federal highway safety programs from being discovered or admitted in federal or state trials, is a valid exercise of Congress' power under the Supremacy, Spending, Commerce or Necessary and Proper Clauses of the United States Constitution.

2. Whether private plaintiffs have standing to assert "states' rights" under the Tenth Amendment where their State's Legislative and Executive branches expressly approve and accept the benefits and terms of the federal statute in question.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

PARTIES TO PROCEEDING xi

STATEMENT UNDER RULE 29.4(b) xii

REPORT OF OPINIONS 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS (SEE APPENDIX "J") 1

STATEMENT OF THE CASE 2

ARGUMENT 7

I. State Court Violates Supremacy Clause 8

A. Spending Clause Authorizes §409 Privilege 13

B. Commerce Clause Also Authorizes §409 22

C. Necessary and Proper Clause Authorizes §409 26

II. Individuals Lack Standing To Claim "State's Rights" Over State's Objections 27

CONCLUSION 29

TABLE OF AUTHORITIES

Table of Cases

Agostini v. Felton, 521 U.S. 203, 237, 138 L.Ed.2d 391, 117 S. Ct. 1997 (1997) 29

Alden v. Main, 527 U.S. 706, 752, 144 L.Ed.2d 636, 119 S. Ct 2240 (1999) 10

City of Atlanta v. Watson, 267 Ga. 185, 475 S.E.2d 896, 903-4 (1996) 11

Claspill v. Miss. Pac. R.R. Co., 793 S.W.2d 139, 141 (Mo.), cert. denied, 498 U.S. 984 (1990) 23

Coniker v. New York, 181 Misc.2d 801, 695 N.Y.S.2d 492, 495 (N.Y. Ct. Cl. 1999) 8, 20, 26

Duncan v. Union Pac. R.R. Co., 790, P.2d 595 (Utah App. 1990) 14, 25

Ex parte Alabama Highway Dep't., 575 So.2d 389 (Ala. 1990), cert.denied, 502 U.S. 937 (1991) 19

F. E. R. C. v. Mississippi, 456 U.S. 742, 758 n.22, 72 L.Ed.2d 532, 102 S. Ct. 2126 (1982) 24

Gaubert v. Denton, 1999 WL 350103 (E.D.La. May 28, 1999) 22

Geier v. American Honda Motor Co., 529 U.S. 861, 146 L.Ed.2d 914, 120 S. Ct. 1913 (2000) 12

Guillen v. Pierce County, 96 Wn.App. 862, 982 P.2d 123 (1999) 1, 4, 27

Guillen v. Pierce County, 139 Wn.2d 1015, 994 P.2d 847 (2000) 5

Guillen v. Pierce County, 144 Wn.2d 696, 31 P.3d 628 (2001) 1, 2, 3, 4, 5, 6, 7 9, 11, 16, 17, 21, 23, 24, 27

Harrison v. Burlington Northern Rail Co., 965 F.2d 155, 160 (7th Cir. 1992) 19, 25

Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 272, 13 L.Ed.2d 258, 85 S. Ct. 348 (1964) 26

Hilstoki v. Meanor, 442 U.S. 500, 507-08, 61 L.Ed.2d 30, 99 S. Ct. 2445 (1979) 6

Hodel v. Indiana, 452 U.S. 314, 328 n. 17, 101 S. Ct. 2376, 69 L.Ed.2d 40 (1981) 24, 25

John Doe Agency v. John Doe Corp.,

493 U.S. 146, 155, 110 S. Ct. 471, 476, 107 L.Ed.2d 462 (1989) 17

Light v. State, 149 Misc.2d 75, 560 N.Y.S.2d 962, 965 (N.Y. Ct. Cl. 1990) 14, 25

Martinolich v. Southern Pac. Transp., 532 So.2d 435, 437 (La. Ct.App.), cert. denied, 490 U.S. 745 (1988) 21

Massachusetts v. United States, 435 U.S. 444, 461, 98 S. Ct. 1153, 55 L.Ed.2d 403 (1978) 16

Mountain States Legal Foundation v. Costle, 630 F.2d 754, 761-72 (10th Cir.), cert. denied, 450 U.S. 1050 (1980) 29

Nance v. Environmental Protection Agency, 645 F.2d 701, 716 (9th Cir. 1981) 28

New York v. United States, 505 U.S. 144, 173, 120 L.Ed.2d 120, 112 S. Ct. 2408 (1992) 10, 13, 27, 28

Norfolk Southern Railway v. Shanklin, 529 U.S. 344, 146 L.Ed.2d 374, 120 S. Ct. 1467 (2000) 12

Palacios v. Louisiana and Delta Railroad, Inc., 740 So.2d 95, n. 6 (La. 1999) 19, 22

Palacios v. Louisiana and Delta Railroad, 775 So.2d 698, 703 (La.App. 2000) 21

Pennsylvania v. Ritchie, 48 U.S. 39 47-50, 94 L.Ed.2d 40, 107 S. Ct. 989 (1987) 6

Perkins v. Ohio Dept. of Transp., 65 Ohio App.3d 487, 584 N.E.2d 794 (1989) 18, 25

Printz v. United States, 521 U.S. 898, 935, 138 L.Ed.2d 914, 117 S. Ct. 2365 (1997) 15

Reichert v. State of Louisiana, 694 So.2d 193, 196 (La. 1997) 18, 25

Robertson v. Union Pacific R.R. Co., 954 F.2d 1433, 1435 (8th Cir. 1992) 14, 19, 25

Rodriguez de Ouijas v. Shearson/ American Express, 490 U.S. 477, 484, 104 L.Ed.2d 526, 109 S. Ct. 1917(1989) 29

Sawyer v. Ill. Cent. Gulf RR Co., 606 So.2d 1069, 1073-4 (Miss. 1992) 12, 21

Seaton v. Johnson, 898 S.W.2d 232, 237 (Tenn. Ct.App. 1995) 12, 17

South Dakota v. Dole, 483 U.S. 203, 211-12, 97 L.Ed.2d 171,

107 S.Ct. 2793 (1987) 15, 16

Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 144, 83 L.Ed.2d 543, 59 S. Ct. 366 (1939) 28

Testa v. Katt, 330 U.S. 386, 392-93, 91 L.Ed. 967, 67 S. Ct. 180 (1947) 22

United States v. Lopez, 514 U.S. 549, 552, 131 L.Ed.2d 626, 115 S. Ct. 1624 (1995) 7, 23

United States v. Morrison, 529 U.S. 598, 605, 146 L.Ed.2d 658, 120 S. Ct. 1740 (2000) 7, 23

Vermont Assembly of Home Health Agencies, Inc. v. Shalala, 18 F.Supp.2d 355 (D.Vt. 1998) 29

Warth v. Seldin, 422 U.S. 490, 499, 45 L.Ed.2d 343, 95 S. Ct. 2197 (1975) 28

Constitutional Provisions

U.S. Const. Art. I, §8, cl. 1 ..... 5, 13
U.S. Const. Art. I, §8, cl. 3 ..... 5, 22
U.S. Const. Art. I, §8, cl. 18 ..... 6, 26
U.S. Const. Art. VI, cl. 2 ..... 10, 12

Statutes

21 U.S.C. §360(i)(B)(3)(c) 9
23 U.S.C. §152 ..... 2, 8, 14, 15, 17, 18, 23
23 U.S.C. §152(a) 14
23 U.S.C. §152(b) 14
23 U.S.C. §152(e) 15
23 U.S.C. §158 15
23 U.S.C. §402 15
23 U.S.C. §409 ..... 3, 4, 5, 6, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 29
23 U.S.C. §1257 1
R.C.W. 47.04.050 11
R.C.W. 47.04.060 11
R.C.W. 47.04.070 11

Court Rules

S.Ct. Rule 10(b) 7
S.Ct. Rule 10(c) 7

Treatises

C. Mueller & L. Kirkpatrick, 2 *Federal Evidence*, §173 at 240-251 (2d Ed. 1994) 9

Other Authority

Act of November 18, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N. (109 Stat.) 17

U.S. Dept. of Trans., *1996 Annual Report on Highway Safety Improvement Programs*, at IV-5 (Apr. 1996) 8

U.S. Dept. of Trans., *1999 Status of the Nation's Highways, Bridges and Transit: Conditions and Performance*, at F-3 8

PARTIES TO PROCEEDING

All parties to the proceeding in the Washington Supreme Court, the court whose judgment is the subject of this petition, do not appear in the caption of this case because the case of Whitmer v. Yuk had been consolidated with the instant case only for appellate purposes and has since settled and been dismissed. See App. I. The parties to the proceeding in the Washington Supreme court were:

1. Pierce County, a municipal corporation (defendant in Guillen v. Pierce County and Whitmer v. Yuk);
2. Ignacio Guillen as legal guardian for Jennifer and Alma Guillen (plaintiff in Guillen v. Pierce County);
3. Mariano Guillen as legal guardian for Paulina and Fatima Guillen (plaintiff in Guillen v. Pierce County);
4. The Estate of Clementina Guillen-Alejandre (defendant in Guillen v. Pierce County);
5. Robert and LuAnn Whitmer, individually and as guardians of Shana, Hanna and Denel Whitmer (plaintiff in Whitmer v. Yuk);
6. Chin S. and "Jane Doe" Yuk (defendant in Whitmer v. Yuk);
7. Chang and "Jane Doe" Choi (defendant in Whitmer v. Yuk);
8. City of Lakewood, a municipal corporation (defendant in Whitmer v. Yuk);
9. City of Tacoma, a municipal corporation (defendant in Whitmer v. Yuk).

STATEMENT UNDER RULE 29.4(b)

Because the proceeding draws into question the constitutionality of 23 U.S.C. §409, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, 28 U.S.C. §2403(a) is applicable.

REPORT OF OPINIONS

The opinion of the Supreme Court of Washington in this case is published at Guillen v. Pierce County, 144 Wn.2d 696, 31 P.3d 628 (2001). The opinion of the Washington Court of Appeals in this case is published at Guillen v. Pierce County, 96 Wn.App. 862, 982 P.2d 123 (1999).

JURISDICTION

The opinion by the Supreme Court of Washington in this case was entered on September 13, 2001, see App. A, and rehearing was denied on November 27, 2001. See App. B.

This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS (SEE APPENDIX "J")

A. U.S. Constitution, Article I, § 8, clause 1
B. U.S. Constitution, Article I, § 8, clause 3
C. U.S. Constitution, Article I, § 8, clause 18
D. U.S. Constitution, Article VI, clause 2
E. U.S. Constitution, Amendment X
F. 23 U.S.C. § 152
G. 23 U.S.C. § 402
H. 23 U.S.C. § 409
I. RCW 47.04.050
J. RCW 47.04.060
K. RCW 47.04.070

STATEMENT OF THE CASE

In May of 1995, Pierce County applied for federal highway safety improvement funds under 23 U.S.C. §152 for one of its intersections and supported its application with data from accident reports, collision diagrams and other similar material it had collected and compiled pursuant to that statute. See Guillen v. Pierce County, 144 Wn.2d 696, 31 P.3d 628, 633 (2001). The request was administered through Washington State's Department of Transportation, but was found not to warrant federal hazard elimination funds. See id. at 633 & 645. The County again applied in the next fiscal year of 1996, but while this second application was pending Clementina Guillen-Alejandre ran a stop sign at the intersection on July 5, 1996, causing her pick up truck to collide with another car -- killing Guillen-Alejandre and injuring to some degree her two daughters and two nieces who were her passengers. See id. at 633. In December of that year Ignacio Guillen, as the survivor of Guillen-Alejandre and in an effort to find grounds for a personal injury lawsuit against Pierce County, filed a "Complaint to Require Public Disclosure of Documents" which sought materials pertaining to, among other things, the accident history at the subject intersection. Id. Because those materials were gathered and maintained by the County for the purpose of applying for federal safety enhancement funds, the County asserted 23 U.S.C. §409 which protects such documents and moved for summary judgment, but the trial court ordered disclosure - and the County appealed. Id. at 634; App. C.

A few months later, on April 14, 1998, Ignacio Guillen (now on behalf of his daughters) and Mariano Guillen (on behalf of Guillen-Alejandre's nieces) filed suit against Guillen-Alejandre's estate and Pierce County as well as served requests for production and interrogatories on the County -- seeking the same material whose availability under the public disclosure act was being appealed. Id. at 634-35. The County's motion for a protective order against discovery of data protected by §409 was denied, plaintiffs' motion to compel granted and the

County ordered to produce the protected data. Id. at 635; App. D, E & F. On January 15, 1999, the County's motions for Discretionary Review and consolidation with its pending public disclosure appeal were granted because "the majority of other jurisdictions reporting appear to support the County's interpretation of 23 U.S.C. §409." Guillen v. Pierce County, 96 Wn. App. 862, 868, 982 P.2d 123 (1999); App. G at 4-5.

Nevertheless, on August 6, 1999, the Court of Appeals affirmed the orders compelling disclosure and discovery. Though it did not decide the issue "because neither party has raised or briefed [the] question," that court sua sponte opined as to the constitutionality of 23 U.S.C. §409:

> It is arguable that Congress lacks the authority to dictate rules of discovery and rules of admissibility for use in state court. In particular, it is at least arguable that Congress lacks the authority to tell this state, or any state, that it "shall not" disclose or admit, in state court litigation, "reports ... or data compiled or collected" by a state agency (e.g. Pierce County's Public Works Department).

96 Wn.App. at 875 n. 26; App. H. On January 5, 2000, the

Washington Supreme Court granted review. Guillen v. Pierce County, 139 Wn.2d 1015, 994 P.2d 847 (2000).

On September 13, 2001, Washington's highest court issued its decision acknowledging that the federal statute creates an evidentiary and discovery privilege in favor of state government, that "Congress clearly intended that the §409 privilege preempt state laws and court rules," and that the accident history "sought by the respondents . . . would appear to be covered by §409." 31 P.3d at 644-47. However, it also ruled that private parties have standing to assert "state's rights" even though "state officials oppose the challenge," id at 648, and that §409 violates the Tenth Amendment to the United States Constitution because under the Spending Clause (U.S. Const. Art. I, §8, cl. 1) there is "no valid federal interest" that "is reasonably served" by the privilege, id at 651, under the Commerce Clause (U.S. Const. Art. I, § 8, cl. 3) the "privilege lacks the requisite nexus to § 409's raison d'etre," id. at 654, and under the Necessary and Proper Clause (U.S. Const. Art.

I, § 8, cl. 18) "it was neither 'necessary' nor 'proper' for Congress" to create the privilege. Id. The court then adopted the minority view of an earlier version of §409 -- a view the Court admitted Congress intended to overrule by its present version -- and held only documents "*cr[illegible]ally* 'compiled' -- i.e. created, composed, recorded" as part of the application process are protected. Id. at 655. Hence it held Guillen is "entitled to at least four of the five items to which he was denied access,"[1] and "[i]f this state court has misconstrued the United States Constitution's limitations upon the federal government's power . . . the United States Supreme Court will so instruct, as is its

[1] Though on remand an in camera review was ordered because "the record contains insufficient facts to apply this standard to all of the disputed items," id. at 656 (emphasis added), such apparently relates to the long list of materials requested in the now dismissed consolidated case of Whitmer v. Yuk. Id at 636-37; App. I. In contrast, the high court's decision that "four of the five" categories of documents sought in Guillen are not protected, must be disclosed and that the assertion of the supposedly unconstitutional §409 to protect them warrants the sanction of attorneys fees is "final." See e.g. Pennsylvania v. Ritchie, 480 U.S. 39, 47-50, 94 L.Ed. 2d 40,107 S. Ct. 989 (1987)(though case remanded for an in camera review of file, case reviewable because a federal privilege "has been finally decided by the highest court of Pennsylvania, and unless we review that decision, the harm that the Commonwealth seeks to avoid -- the disclosure of the entire confidential file--will occur regardless of the result on remand."); Helstoki v. Meanor, 442 U.S. 500, 507-08, 61 L.Ed. 2d 30,99 S.Ct. 2445 (1979)(denial of privilege was final decision).

constitutional role under our federalist system of government." Id at 655-56. On November 27, 2001, reconsideration was denied. App. B. On January 2, 2002, Justice O'Connor recalled and stayed the state court mandate pending resolution of the instant petition for certiorari. See 1/2/02 Order # 01A452.

ARGUMENT

Certiorari is necessary because the decision of Washington's court of last resort "invalidated a federal statute on constitutional grounds," United States v. Morrison, 529 U.S. 598, 605, 146 L.Ed.2d 658, 120 S.Ct. 1740 (2000); see also United States v. Lopez, 514 U.S. 549, 552, 131 L.Ed.2d 626, 115 S.Ct. 1624 (1995), "conflicts with [every] decision of []other state court[s] of last resort [and] of United States Court of Appeals" that has addressed the question,[2] see S.Ct. Rule 10(b), and "conflicts with relevant decisions of this Court."[3] See S.Ct. Rule 10(c). Further, the state court decision not only strikes

[2] See citations and discussion infra at 11-12, 17-22, 23, 25-26.

[3] See citations and discussion infra at 10, 13-15, 22-25, 27-29.

down a federal privilege whose frequent amendment to counteract such judicially imposed limitations "reflects an obvious Congressional intent to strengthen the protection afforded to materials within its coverage," Coniker v. New York, 181 Misc.2d 801, 695 N.Y.S.2d 492, 495 (N.Y. Ct. Cl. 1999), but also lessens the ability of state government to protect its traveling public.[4] Accordingly, petitioner respectfully requests this Court accept the state court's challenge and issue a writ of certiorari to review this violation of the Supremacy Clause.

I. STATE COURT VIOLATES SUPREMACY CLAUSE

In 23 U.S.C. §409 Congress expressly provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway/highway crossings, pursuant to Sections 130, 144 and 152 of this title, or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in federal or state court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data.

(Emphasis added). In Guillen v. Pierce County, 144 Wn.2d 696, 31 P.3d 628, 655 (2001), the Washington Supreme Court refuses to enforce this federal privilege granted the states because it holds "Congress fundamentally lacks authority to intrude upon state sovereignty by barring state and local courts from admitting into evidence or allowing pretrial discovery of routinely created traffic and accident related materials and 'raw data' . . . ."[5]

Though §409's privilege is a benefit and not a burden to

[4] 23 U.S.C. §409 applies to raw data required to be collected or compiled "pursuant to sections .... 152 of this title," and the refusal to comply with the statute jeopardizes the state's ability to obtain federal funding under 23 U.S.C. §152. As of 1996, that program had "helped to prevent more than 26,500 deaths and 760,000 nonfatal injuries since 1974." U.S. Dept. of Trans., 1996 Annual Report on Highway Safety Improvement Programs, at IV-5 (Apr. 1996). See also U.S. Dept. of Trans., 1999 Status of the Nation's Highways, Bridges and Transit: Conditions and Performance, at F-3 (over $4.81 billion dollars has been obligated and more than 35,000 projects implemented under the program).

[5] Such a holding also undermines other federal privileges which protect documents that are not created pursuant to some federal requirement such as 21 U.S.C. §360(i)(B)(3)(c)(safety and effectiveness reports privileged) and those listed in C. Mueller & L. Kirkpatrick, 2 Federal Evidence, §173 at 240-251 (2d Ed. 1994).

state government, the Supremacy Clause nevertheless provides:

> [T]he Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI cl. 2 (emphasis added). Hence:

> Although Congress may not require the legislative or executive branches of the States to enact or administer federal regulatory programs, Printz [v. United States, 521 U.S. 898,] 935 [,138 L.Ed.2d 914, 117 S.Ct. 2365 (1997)]; New York [v. United States], 505 U.S. [144,] 188[, 120 L. Ed.2d 120, 112 S.Ct. 2408 (1992)], it may require state courts . . . "to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power." Printz, supra, at 907.

Alden v. Main, 527 U.S. 706, 752, 144 L.Ed.2d 636, 119 S.Ct. 2240 (1999)(emphasis added). See also New York, 505 U.S. at 178-179 ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause.") Here, Washington's legislative and executive

branches have both accepted the §409 privilege,[6] and enforcing rules of discovery and admissibility undeniably "relat[e] to matters appropriate for the judicial power."

Accordingly, until now courts "[u]niformally ... have held that section 409 is applicable in state court" because "[t]o hold otherwise defeats a significant purpose of the federal act and cannot be justified in light of the supremacy clause." City of Atlanta v. Watson, 267 Ga. 185, 475 S.E.2d 896, 903-4 (1996). As

---

[6] The Washington Legislature by statute directs that "[i]n all matters relating to the cooperative construction or improvement of any ... county road ... for which federal funds or aid is secured under any act of congress" the state will "act in the manner provided by state law ... so far as the same may be consistent with the provisions of such act of congress ...." RCW 47.04.070 (emphasis added). See also RCW 47.04.050 ("The state of Washington hereby assents to the purposes, provisions, terms and conditions of the grant of money provided" in an earlier version of 23 U.S.C. et seq. providing for construction of roads "and all acts, grants and appropriations amendatory and supplementary thereto and affecting the state of Washington.")(emphasis added); RCW 47.04.060 (authorizing the relevant state agency "to enter into such agreement with the ... duly authorized agent of the United States as may from time to time be desirable or necessary to secure the money or aid for any section of ... county road ... selected by law for construction or improvement through an appropriation for the period in which the construction or improvement is to be made.") Similarly, the state executive not only directly administers such federal highway funds for Pierce and other Washington state Counties, see 31 P.3d at 645, but as amicus curiae before the state supreme court "agree[d] with Pierce County that §409 does not offend the Constitution, and joins in the arguments advanced by the County to that effect." 10/17/00 Amicus By State of Wash., at 20 (emphasis added).

another state's high court recognizes:

> Section 409 is one of the laws of the United States by which all judges of this state and the courts they serve are bound, notwithstanding anything in the constitution and laws of this state, having to do with rule-making power, inherent authority, ... or anything else.

Sawyer v. Ill. Cent. Gulf RR Co., 606 So.2d 1069, 1073-4 (Miss. 1992). See also Seaton v. Johnson, 898 S.W.2d 232, 237 (Tenn. Ct.App. 1995)("If the forgoing is deemed to be unjust the remedy lies with Congress" citing Art. VI, § 2). In that Congressional abolition of certain types of state torts is routinely upheld as constitutional, see e.g. Geier v. American Honda Motor Co., 529 U.S. 861, 146 L.Ed.2d 914, 120 S.Ct. 1913(2000)(state common law "no airbag" action preempted); Norfolk Southern Railway v. Shanklin, 529 U.S. 344, 146 L.Ed.2d 374, 120 S.Ct. 1467 (2000) (regulation enacted under 23 U.S.C. preempted state tort action for negligent maintenance of grade crossing), it is difficult to understand how 23 U.S.C. §409's discovery and evidentiary protections in a specific type of state tort can be unconstitutional.

Nevertheless, even if the Supremacy Clause did not independently impose "an obligation on state judges to enforce federal prescriptions," §409 comes within other Congressional authority and universally is held to do so.

A. Spending Clause Authorizes § 409 Privilege

Article I, §8, clause 1 (i.e. the "Spending Clause") empowers Congress to "provide for the ... general Welfare of the United States," and is held to authorize legislation effecting even state legislatures and executives. Hence, in New York v. United States, 505 U.S. 144, 173, 120 L.Ed.2d 120, 112 S.Ct. 2408 (1992), this Court found where Congress "conditioned grants to the States upon the States' attainment of a series of milestones," it acts "well within the authority of Congress under the Commerce and Spending Clauses." Such Congressional "encouragement," as opposed to "compulsion," was held to honor principles of federalism because "residents of the State retain the ultimate decision as to whether or not the State will comply" so if "a state's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant." Id at 168.

Here, §409 applies to raw data collected or compiled "pursuant to sections .... 152 of this title," and §152(a) provides for states to identify hazardous public roads while §152(b) authorizes the federal government to "approve as a project under this section any highway safety improvement project." Hence, under §152 Congress conditions grants of federal highway safety funds on states' attainment of the milestone of identifying potentially hazardous roads and -- as an additional incentive to gather the data necessary for such identification -- Congress under §409 protects records so obtained and kept under the program from discovery or admission in suits involving the road in question. See e.g. Robertson v. Union Pacific R.R. Co., 954 F.2d 1433, 1435 (8th Cir. 1992)(citing Duncan v. Union Pac. R.R. Co, 790 P. 2d 595 (Utah App. 1990), aff'd, 842 P.2d 832 (Utah 1992) and Light v. State, 149 Misc.2d 75, 560 N.Y.S.2d 962, 965 (N.Y. Ct. Cl. 1990))("the underlying intent of the statute is to 'facilitate candor in administrative evaluations of highway safety hazards,' and to prohibit federally required record-keeping from being

used as a 'tool ... in private litigation.'")(emphasis added).

Indeed, the same statutory scheme of which §152 and §409 are a part -- i.e. 23 U.S.C. et. seq. -- has been upheld by this Court as constitutional under the Spending Clause and been given as an example of a proper exercise of Congressional power. See South Dakota v. Dole, 483 U.S. 203, 211-12, 97 L.Ed.2d 171, 107 S.Ct. 2793 (1987)(23 U.S.C. § 158 constitutional under Spending Clause because, "[e]ven if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in §158 is a valid use of the spending power" because "the enactment of such laws remains the prerogative of the States not merely in theory but in fact.") See also Printz, 521 U.S. at 936 (O'Connor, J., concurring)(conditions imposed on funds apportioned to the states under 23 U.S.C. §402 -- which include the §152(e) hazard elimination funds involved here -- are valid under Spending Clause).

As noted above, in Washington the citizenry has made the ultimate decision through its state legislature and executive

that they accept the federal protection and terms of §409. See supra, n. 6. Nevertheless, though it admits §409 is one of the "strings attached" to the state's willing acceptance of federal safety enhancement funds, 31 P.3d at 651, the Washington Supreme Court concludes such conditions are not "'relevant' and 'reasonably related' to a valid federal interest in a specific national project or program." Id at 650 (citing Dole, 483 U.S. at 208 and Massachusetts v. United States, 435 U.S. 444, 461, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978)). Indeed, it specifically held:

> We find no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and 'raw data' that were originally prepared for routine state and local purposes, simply because they were 'collected,' for, among other reasons, pursuant to a federal statute for federal purposes.

31 P.3d at 651. However, the privilege for such "collected" data serves an essential interest to the operation of the federal program, and every other court considering its purpose has so held.

The Washington Supreme Court itself acknowledges

"§152 requires jurisdictions to 'systematically maintain' complete, ongoing collections of all accident related materials and data on 'all public roads,'" 31 P.3d at 646, so that:

> By forcing state and local governments to identify all "public roads" that "may constitute a danger to motorists, bicyclists, and pedestrians," and to rank the most hazardous among them in writing, Congress accorded private tort plaintiffs an added advantage in their efforts to prove negligent governmental design or maintenance of certain traffic sites. In 1987, Congress enacted 23 U.S.C. §409 at least in part to address this problem.

Id. at 641 (emphasis added). The Washington court further concedes Congress never intended the narrow interpretation -- given prior to §409's 1995 clarifying amendment by some state courts and now resurrected by Guillen -- that misapplied the privilege only to documents created under the federal program.[7] See Id. at 644, 655. See also Act of November 18, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N. (109 Stat.) 591; Seaton, 898 S.W.2d at

---

[7] Such required an unreasonably narrow reading of §409's use of the term "compiled," contrary to John Doe Agency v. John Doe Corp., 493 U.S. 146, 155, 110 S.Ct. 471, 476, 107 L.Ed.2d 462 (1989)("[d]ocuments having been compiled once for [one] purpose . . . were not disqualified from being 'compiled' again later for a different purpose.")

235-237 (before the 1995 amendment state court holds accident reports protected by "clear weight of authority" because "all records used or useable in identifying, evaluating or planning safety of highways or rail-highway crossings pursuant to Sections 130, 144 and 152 of 23 U.S.C. are so immune to examination.")

Hence, both before and after its current language was enacted, §409 was intended to "remedy this problem" of municipalities not gathering and retaining data as part of the federal application process out of fear "private tort plaintiffs [would have] an added advantage in their efforts to prove negligent governmental design or maintenance of certain traffic sites." Both before and after the 1995 amendment other courts had no problem identifying this obtaining and keeping of information as the federal interest for §409's discovery and evidentiary privilege. See e.g. Reichert v. State of Louisiana, 694 So.2d 193, 196 (La. 1997)(quoting Perkins v. Ohio Dept. of Transp., 65 Ohio App. 3d. 487, 584 N.E. 2d 794 (1989), cause dismissed, 57 Ohio St.3d 612, 566 NE 2d 673, rehearing denied, 58 Ohio St.3d 711, 570

N.E. 2d 281 (1991)("The interest to be served by such legislation is to obtain information with regard to the safety of roadways free from the fear of future tort actions.");Harrison v. Burlington Northern Rail Co., 965 F.2d 155, 160 (7th Cir. 1992)(quoting Robertson, 954 F.2d at 1435)("the underlying intent of the statute is to . . . prohibit federally required record-keeping from being used as a 'tool ... in private litigation.'"). As the Solicitor General expained concerning §409: "If reports and data concerning potential highway safety hazards are subject to discovery in tort actions, State and private parties will likely be deterred from compiling complete and accurate information about such hazards" and "[a]s a result, information about safety programs -- which depend on information about safety problems supplied by the States and private entities such as railroads-- will be jeopardized." See Palacios v. Louisiana and Delta Railroad Inc., 740 So. 2d 95, n. 6 (La. 1999)(quoting amicus brief in Ex parte Alabama Highway Dep't, 575 So.2d 389 (Ala.1990), cert. denied, 502 U.S. 937 (1991))(emphasis added).

The "valid federal interest" in this privilege for "compiled and collected" data is that it encourages states to "obtain information" and conduct "record keeping" necessary to identify those roads most in need of limited federal roadway safety funds. As a state court explained after the 1995 clarifying amendment:

> ... Congress has determined that the effect of the prohibition would be to enhance the safety of the nations's highways and, in the long run reduce the number of people killed and injured in accidents that could be avoided by systematic analysis, and that this goal outweighs the barriers that it creates for litigants attempting to prove that a state's negligence contributed to their injuries. . . . . Our system of government assigns the balancing of such competing interests to the legislative branch, and the role of this court is not to second guess the analysis that resulted in this evaluation, or to attempt, in a particular case, to find a way around it, but rather to effectuate Congressional intent.

Coniker, 695 N.Y.S.2d at 495. Under the Spending Clause, §409 is constitutional simply because, as another state court notes:

> [N]obody made [the state] get into the ... safety enhancement program. It is a voluntary program. Duly authorized officials of this state, however, have committed us to the program -- in exchange for ninety percent federal funding -- and it does not strike us outrageous that we should accede to

> the federal government's rules and regulations appertaining thereto.

Sawyer, 606 So.2d at 1074. In summary, §409 is valid under the Spending Clause because, as yet another state court explains:

> Congress' intrusion, in this instance, however, is constitutionally permissible because [the state's] participation in the federal funding scheme is voluntary; because the improvement of state highways with federal funds is in pursuit of "[providing] for the general welfare" as provided in U.S.Const.Art. I, §8, cl. 1 ("spending power"); because it is clear that participation in the funding program requires acquiescence to the intrusion; and finally, because the intrusion is related to a valid federal interest (inasmuch as 23 U.S.C. §409 encourages participation in a scheme that ensures, by prioritization, deliberative spending of federal funds.)

Martinolich v. Southern Pac. Transp., 532 So.2d 435, 437 (La. Ct. App.), cert. denied, 490 U.S. 745 (1988)(emphasis added).[8]

Before Guillen v. Pierce County, "[e]very court that has

---

[8] The Washington high court asserts Martinolich analyzed "Congress' power to enact 23 U.S.C. §409 in its pre-1995 form." 31 P.3d at 651. However, the holding and language of Martinolich continue to be cited and quoted after the 1995 clarifying amendment as still supporting the conclusion that §409 is "constitutional . . . as a valid intrusion on the state's regulation of its court system." Palacios v. Louisiana and Delta Railroad, 775 So.2d 698, 703 (La.App. 2000)(data "compiled and collected" pursuant to §409 is protected from discovery)(emphasis added).

considered the privilege, both federal and state, has concluded that it serves the legitimate purpose of fostering the collection and evaluation of highway safety information free from the threat of future tort actions." Palacios v. Louisiana and Delta Railroad, 775 So.2d 698, 701 (La.App. 2000)(quoting Gaubert v. Denton, 1999 WL 350103 (E.D.La. May 28, 1999))(emphasis added). The Washington court alone holds this eagerly accepted federal benefit to states is unconstitutional because it is inconsistent with its court procedure, but this Court has made clear no state court can refuse to enforce federal law on the ground "the act of Congress is not in harmony with the policy of the State . . ." Testa v. Katt, 330 U.S. 386, 392-93, 91 L.Ed. 967, 67 S.Ct. 810 (1947).

B. Commerce Clause Also Authorizes §409

Article I, §8, clause 3 (i.e. "Commerce Clause"), also empowers Congress "[t]o regulate Commerce ... among the several States," and is held to authorize Congress to "regulate the use of the channels of interstate commerce," to "regulate and protect the instrumentalities of interstate commerce, ... even though the

threat may come only from intrastate activities," and "to regulate those activities having a substantial relation to interstate commerce." Morrison, 529 U.S. 598 (citing, Lopez, 514 U.S. at 558-59)(emphasis added). It cannot fairly be disputed that the incentives for states to participate in enhancing the safety of roadways across the nation under §152 and §409 favorably effect "the instrumentalities of interstate commerce" as well as have "a substantial relation to interstate commerce." See Claspill v. Miss. Pac. R.R. Co., 793 S.W.2d 139, 141 (Mo.), cert. denied, 498 U.S. 984 (1990)(Tenth Amendment challenge to §409 rejected because under Commerce Clause States "are not to create 'judicially defined spheres of unregulable state activity.'")

Indeed, the Washington Supreme Court concedes "a sufficient nexus exists between interstate commerce and the Federal-aid highway system to justify the 'regulatory scheme when considered as a whole,'" 31 P.3d at 654 (emphasis added), but concludes the §409 protection is not an "integral part" of the regulatory program because "we fail to see how those vital federal

purposes are reasonably served" by a privilege protecting "materials and data that would exist even had a federal safety enhancement program never been created . . . ." See Id. (citing Hodel v. Indiana, 452 U.S. 314, 328 n. 17, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981)). However, such misapplies this Court's test in Hodel v. Indiana and misstates the purpose of the §409 privilege.

In Hodel, appellees similarly asserted -- as does the state supreme court here -- "that a number of the specific provisions challenged in this case cannot be shown to be related to the congressional goal . . . ." 452 U.S. at 329 n. 17. Yet this Court held:

> This claim, even if correct, is beside the point. A complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.

Id. (emphasis added). See also F. E. R. C. v. Mississippi, 456 U.S. 742, 758 n. 22, 72 L.Ed.2d 532, 102 S.Ct. 2126 (1982)(federal statute valid under Commerce Clause "even if some of its

provisions were not directly related to the purpose of fostering interstate commerce"). Hence, under Hodel, a court cannot "substitute its judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent." 452 U.S. at 327 (emphasis added).

Further, even if this Court's Constitutional jurisprudence were different so that "every single facet of the program" was required to be "independently and directly related to a valid congressional goal," §409 is so related. In holding otherwise, Washington's highest court disregards overwhelming case law confirming that the "the underlying intent" of §409 is not just "to 'facilitate candor in administrative evaluations of highway safety hazards'" in documents created under the program, but also "to prohibit federally required record-keeping from being used as a 'tool ... in private litigation'" against state and local government. Robertson, 954 F.2d at 1435 (quoting Duncan, supra and Light, 560 N.Y.S.2d at 965). See also Harrison, 965 F.2d at 160 (quoting Robertson, 954 F.2d at 1435)(same); Reichert, 694 So.2d at

196 (quoting Perkins, supra)("interest to be served by such legislation is to obtain information with regard to the safety of roadways free from the fear of future tort actions.") The §409 privilege for "obtaining" and "keeping" (i.e. collecting and compiling) the required information is an "integral part" of the valid Congressional goal of encouraging states to comply with this federal program and thereby "enhance the safety of the nations's highways and, in the long run reduce the number of people killed and injured in accidents that could be avoided by systematic analysis . . . ." See Coniker, 695 N.Y.S.2d at 495, and supra at 16-21.

C. Necessary And Proper Clause Authorizes §409

The "Necessary and Proper" Clause, Article I, §8, clause 18, adds to the commerce power of Congress the power to regulate local instrumentalities operating within a single State if their activities burden the flow of commerce among the States." See Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 272, 13 L.Ed. 2d 258, 85 S.Ct. 348 (1964)(Black, J., concurring). However, the state supreme court again simply summarily "conclude[s] that

it was neither 'necessary' nor 'proper' for Congress" to enact that privilege as presently written. See 31 P.3d at 655. As shown above, such is demonstrably erroneous. See supra at 16-22.

II. INDIVIDUALS LACK STANDING TO CLAIM "STATE'S RIGHTS" OVER STATE'S OBJECTION.

Here plaintiffs did not in the first instance "claim" state's rights but had the issue thrust upon them by the state court. See 31 P.3d at 646-47 (limits of Congressional power "raised by the Court of Appeals itself in the final footnote of its Guillen opinion."); 96 Wn.App. at 875 n. 26 ("neither party has raised or briefed" constitutionality.) More problematical, Guillen bestows standing on plaintiffs to raise "federalist grounds" because "dicta" from New York v. United States, 505 U.S. at 181-2, states that "departure from the constitutional plan cannot be ratified by the 'consent' of state officials." 31 P.3d at 648.

However, a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties" so that he "has no standing to assert the [constitutional] rights of others." Warth v. Seldin,

422 U.S. 490, 499, 45 L.Ed.2d 343, 95 S.Ct. 2197 (1975). Here Washington citizens through both their state legislative and executive branches have willingly accepted the terms for the pertinent federal funding. See supra at n. 1. Further, in New York v. United States the only plaintiff was the state and an individual's standing was never discussed -- indeed the word "standing" is nowhere used. Rather, the cited statement was only made in rejecting an assertion New York had waived its Tenth Amendment right by lending "their support to the Act's enactment." More importantly, New York nowhere addresses this Court's ruling in Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 144, 83 L.Ed.2d 543, 59 S.Ct. 366 (1939), that "absent the states or their officers, [individuals] have no standing ... to raise any question under the [tenth] amendment."

This Court has not overruled its decision in Tennessee Electric Power Co. See also Nance v. Environmental Protection Agency, 645 F.2d 701, 716 (9th Cir.1981)("insofar as the Tenth Amendment is designed to protect the interest of states qua

states," standing of private party "may be seriously questioned"); Mountain States Legal Foundation v. Costle, 630 F.2d 754, 761-72 (10th Cir.), cert. denied, 450 U.S. 1050 (1980)(no jurisdiction over Tenth Amendment where state "flatly contradicted" plaintiff's claims); Vermont Assembly of Home Health Agencies Inc. v. Shalala, 18 F.Supp.2d 355 (D.Vt. 1998)(no Tenth Amendment standing where state opposed). Because "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Courts of Appeals should follow the case that directly controls, leaving to this Court the prerogative of overruling its own decisions," Agostini v. Felton, 521 U.S. 203, 237, 138 L.Ed.2d 391, 117 S.Ct. 1997 (1997); Rodriguez de Quijas v. Shearson/ American Express, Inc., 490 U.S. 477, 484, 104 L.Ed.2d 526, 109 S. Ct. 1917 (1989), certiorari is also appropriate on the issue of standing.

CONCLUSION

In §409, Congress foists nothing on a state but rather provides it an incentive to willingly participate in a program that en-

hances the safety of its traveling public while also protecting its collection and compiling of necessary records. Nevertheless, in the alleged service of "state's rights" a state government's discovery and evidentiary protection -- clearly existing under federal law and previously universally recognized by state and federal courts -- will be irrevocably lost, the state's federal funding for elimination of roadway hazards and its citizen's safety both jeopardized, and bedrock principles of federalism dangerously undermined. Accordingly, petitioner respectfully requests certiorari be granted.

RESPECTFULLY SUBMITTED THIS 20th DAY OF FEBRUARY, 2002.

GERALD A. HORNE
Prosecuting Attorney

By _____
DANIEL R. HAMILTON
Dep. Pros./WSBA #14658
Attys for Pierce County

GERALD A. HORNE
Prosecuting Attorney

By _____
SUSAN P. JENSEN
Dep. Pros./WSBA #12187
Attys for Pierce County

(2)

Supreme Court, U.S.
FILED

NO. 01 1229 FEB 22 2002

OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 2001

PIERCE COUNTY,
Petitioner/Defendant,

v.

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,
Respondents/Plaintiffs

On Petition for Writ of Certiorari
To the Supreme Court of the State of Washington

APPENDIX

GERALD A. HORNE
Pierce County Prosecuting Attorney
By
DANIEL R. HAMILTON
and SUSAN JENSEN
Deputy Prosecuting Attorneys
Attorneys for Petitioner
955 Tacoma Ave. S., Suite 301
Tacoma, WA 98402
PH: (253) 798-7746

20618

APPENDIX

A: 9/13/01 Opinion of Washington Supreme Court

B: 11/27/01 Orders Changing Opinion and Denying Further Reconsideration

C: 11/5/97 Order on Summary Judgment Motions

D: 10/23/98 Order Denying Protective Order

E: 10/23/98 Order Granting Motion To Compel

F: 11/20/98 Amended Order Granting Motion To Compel

G: 1/15/99 Ruling Granting Review And Consolidation

H: 8/6/99 Opinion of Washington Court Of Appeals

I: Dismissal in Whitmer v. Yuk, et al.

J: *Verbatim Constitutional And Statutory Provisions

1. U.S. Constitution, Article I, § 8, clause 1
2. U.S. Constitution, Article I, § 8, clause 3
3. U.S. Constitution, Article I, § 8, clause 18
4. U.S. Constitution, Article VI, clause 2
5. U.S. Constitution, Amendment X
6. 23 U.S.C. § 152
7. 23 U.S.C. § 402
8. 23 U.S.C. § 409
9. RCW 47.04.050
10. RCW 47.04.060
11. RCW 47.04.070

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IGNACIO GUILLEN, as legal guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as legal guardian for PAULINA GUILLEN and FATIMA GUILLEN,	)	NO. 68535-5
	)	EN BANC
Respondents,	)	
v.	)	
PIERCE COUNTY, a municipal corporation,	)	
Petitioner,	)	Filed: Sep 13, 2001
THE ESTATE OF CLEMENTINA GUILLEN-ALEJANDRE,	)	
Defendant.	)	
ROBERT and LuANN WHITMER, husband and wife, individually, and as the guardians of SHANNA WHITMER, a minor, HANNAH WHITMER, a minor, and DENEL WHITMER, an incapacitated person,	)	
Respondents,	)	

v.	)
CHIN S. YUK and "JANE DOE" YUK, husband and wife, and the marital community composed thereof, and CHANG CHOI and "JANE DOE" CHOI, husband and wife, and the community composed thereof; CITY OF LAKEWOOD, a municipal corporation; PIERCE COUNTY, a municipal corporation; and the CITY OF TACOMA, a municipal corporation,	)
Petitioners.	)

BRIDGE, J.--The respondents in these consolidated cases seek access to accident reports and other materials and data held by the local government petitioners relating to the traffic history of the sites of their subject car accidents. Petitioners claim that all accident reports are nondiscoverable, since

RCW 46.52.080 declares the "confidential" and inadmissible. Petitioners also contend that *all* the materials and data at issue are privileged under 23 U.S.C. § 409--and consequently also exempt from public disclosure under RCW 42.17.310(j) --since they were, according to sworn declarations in the record, "compiled" or "collected" by petitioners pursuant to 23 U.S.C. § 152 so as "to identify hazardous locations, sections, and elements" on "all public roads" that might prove to be good candidates for federally funded safety enhancement projects. Petitioners note that 23 U.S.C. § 409 was expressly amended by Congress in 1995 to cover all "reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety

enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to §§ 130, 144, and 152 of this title." We reject both arguments.

While RCW 46.52.080 exempts accident reports prepared by persons involved in accidents from public disclosure or admission as evidence in certain trials, we hold that they remain discoverable. Furthermore, we hold that Congress' 1995 amendment to 23 U.S.C. § 409 violates the United States Constitution's federalist design as defined by its framers and by the United States Supreme Court, insofar as it makes state and local traffic and accident materials and data nondiscoverable and inadmissible in state and local courts, simply because the are *also* "collected" and used for

federal purposes. We hold that only materials and data originally *created* for the statutorily identified federal purposes are lawfully covered by the federal privilege and, thus, exempt from public disclosure under RCW 42.17.310(j). Because there are insufficient facts in the record to apply this standard to all of the disputed items in these consolidated cases, we vacate the lower courts' rulings and remand for supplementation of the record and further proceedings not inconsistent with this opinion.

FACTS

Guillen

On July 5, 1996, Ignacio Guillen's wife, Clementina Guillen-Alejandre, was killed and her passengers injured in an automobile collision at the intersection

of 168th Street East and B Street East, in Pierce County. Months earlier, on May 11, 1995, based on traffic and accident reports and data in its possession, Pierce County had identified this intersection as especially hazardous and applied for federal hazard elimination funds under 23 U.S.C. § 152. That application was denied. The County then reapplied on April 3, 1996, and on July 26, 1996, three weeks *after* Guillen-Alejandre's fatal accident, the application was granted.

A letter dated August 16, 1996, was sent on Guillen's behalf to the County's Risk Management Department, requesting materials and data relating to the intersection's accident history. The county prosecuting attorney's office denied the request in a letter dated Sep-

tember 9, 1996, claiming the history was privileged under 23 U.S.C. § 409 and RCW 42.17.310(j). In a letter dated October 28, 1996, counsel for Guillen clarified his request: "I want to make the record clear that we are not seeking any reports that were specifically written for developing any safety construction improvement project at the intersection at issue." Clerk's Papers (CP) at 93.

> However, on behalf of our clients, we are seeking a copy of all documents that record the accident history of the intersection that may have been used in the preparation of any such reports. In other words, we are simply seeking information as to when accidents have occurred at the intersection for the last ten years. This would include any documents that record (1) the date of any such accidents, (2) the parties involved at each such accident, (3) the date of each such accident [sic], (4) fatalities, if any, at each such accident, (5) the identification of all known accidents [sic] at each such accident, (6) copies of photographs taken at each such accident, (7) the

> configuration of the intersection (what traffic signs existed) at the time of each such intersection [sic], and (8) documents recording traffic counts at the intersection.
>
> Obviously, the documents we are requesting would not contain any opinions by Pierce County representatives as to the safety of the intersection. Instead, we are seeking documents pertaining to the facts.

Id. at 93-94. In a letter dated November 12, 1996, the County reiterated its refusal to release any of the requested materials or factual data relating to the intersection other than a simple traffic count, claiming that these were privileged under 23 U.S.C. § 409, since they represented "data the County has compiled for the sole purpose of identifying[,] evaluating or planning the safety enhancement of potential accident sites, hazardous roadway conditions or for developing highway safety construction improvement projects" pursuant to

section 152. CP at 96.

A. Public Disclosure Request: On December 9, 1996, Guillen challenged that denial of access in Pierce County Superior Court in a complaint filed under RCW 42.17.340 of the public disclosure act (PDA). The County moved for summary judgment under 23 U.S.C. § 409 and RCW 42.17.310(j). Guillen filed a cross-motion for summary judgment. The trial court denied the County's motion, but granted Guillen's cross-motion, ordering the County to pay attorney fees under RCW 42.17.340(4) and to disclose the following materials:

> 1. Motor vehicle traffic accidents by location--County of Pierce--prepared by Records Section, Washington State Patrol [WSP], 1/90 - 6/30/96.
> ...
> 10. Collision diagram dated 1/5/89 prepared by Georgia Fischer.
> 11. Collision diagram dated 7/18/88 prepared by Georgia Fischer.

> ...
> 13. Police Traffic Collision Reports and Motor Vehicle Reports from 1/1/90 prepared by [various] law enforcement agencies.
> ...
> 15. Draft letter to Barbara Gelman from Frederick L. Anderson with note to file signed by Jim Ellison on 3/6/89.

CP at 20-21.[1] The County sought appellate

---

[1] Thomas Ballard, the County Engineer, described these items in greater detail as follows:

> 5. Two of the documents at issue are items 1 and 13. Item no. 13 is a collection of the accident reports for the subject intersection from 1990 through 1996. Item no. 1 is a list of those same accidents showing the location, time, date and nature of the accident. A study of the accidents at the intersection was a crucial element in the County's review of the operation and safety of the intersection. The County collected those accident reports solely for that purpose. The decision to apply for Section 152 funds was based in large part on those accident reports. The nature of the accidents, as identified in those reports, was a critical determining factor in the County's design of the safety improvement for which appli-

(continued...)

[1](...continued)
cation was made. The WSDOT [Washington State Dep't of Trans.] requires the County to fill out a prospectus to apply for Section 152 funds ... The prospectus specifically requires an accident history. If the County did not collect and analyze the accident reports, it would not be possible to plan and implement the safety improvements and it would be impossible to apply for and receive Section 152 funds.

6. Items 10 and 11 are collision diagrams ... used to consider whether the design of the intersection was a causative factor in the accidents and what, if any, design improvements could be made to increase safety and lessen the possibility of future accidents ... The Section 152 application specifically requires an explanation and design of the proposed improvement. Items 10 and 11 ... were compiled and used specifically for the purpose of determining the need for and designing the signalization improvement that was the basis of the Section 152 application and that was ultimately installed at the intersection.

CP at 54-55 (Third Decl. of Thomas G. Ballard, P.E., County Engineer).

2. Item 15 ... is the draft of a memorandum from Fred Anderson, then Public Works Director, to Barbara

(continued...)

review of the trial court's PDA ruling.[2]

B. Civil Discovery Request: While that appeal was still pending, Guillen filed a separate tort action in Pierce County Superior Court, claiming that the County's failure to install proper traffic controls at the intersection was a negligent proximate cause of his wife's death. When the County responded to his interrogatories by invoking 23 U.S.C. §

[1](...continued)
Gelman, then County Council member. It consists of information used for the County's application for federal funds for safety enhancement at the intersection of 168th Street East and B Street East.

CP at 39 (Supp. Decl. of Thomas G. Ballard, P.E., County Engineer).

[2] Initially, Pierce County has also refused to disclose "communication[s] to the County regarding a perceived problem at the intersection," but later "determined that it was not necessary to assert the [section 409] privilege for these particular documents, and they were provided to plaintiff." CP at 40.

409 and RCW 42.17.310(j), Guillen moved to compel, whereupon the County moved for a protective order. The court granted Guillen's motion, denied the County's, and ordered pretrial discovery of the following materials and data:

> 1. The identity of all employees, agents, or officials of Defendant Pierce County who have knowledge of automobile accidents taking place at the intersection at issue for the time period January 1, 1990 through July 4, 1996;
> 2. The identity of all persons within Pierce County's knowledge who have been involved in automobile accidents at the intersection at issue for the time period of January 1, 1990 through July 5, 1996;
> 3. The identity of all Pierce County deputy sheriffs who patrolled the intersection at issue during the time frame of January 1, 1990 through July 4, 1996;
> 4. The date, identity of all persons involved, and the identity of all fatalities for each automobile accident occurring at the intersection at issue for the time period of January 1, 1990 through July 5, 1996;
> 5. A copy of photographs[] Pierce County has in its possession, con-

> trol or custody of accidents involving at least one automobile at the intersection at issue from January 1, 1990 through July 6, 1996;
> 6. A copy of all written statements by witnesses to accidents at the intersection at issue that occurred during the time period of January 1, 1990 through July 6, 1996; and
> 7. A copy of all accident reports sent to Pierce County from individuals who had been involved in automobile accidents at the intersection at issue from January 1, 1990 through July 4, 1996.

Amended Order Granting Pls.' Mot. to Compel Disc. at 1-2.

On December 7, 1998, the County successfully moved the Court of Appeals for discretionary review and for consolidation of the case with Guillen's appeal of the PDA ruling. The Court of Appeals issued its decision on August 6, 1999, holding that the 23 U.S.C. § 409 privilege covered only one of the disputed items. Accident reports were *not* cov-

ered, the court ruled, since "Guillen carefully requested reports in the hands of the sheriff or other law enforcement agencies, *not* reports or data 'collected or compiled' by the Public Works Department 'pursuant to' Section 152." *Guillen v. Pierce County*, 96 Wn. App. 862, 873, 982 P.2d 123 (1999). In the final footnote of its opinion, though, the court raised a more fundamental question regarding the constitutionality of § 409 as amended in 1995:

> It is arguable that Congress lacks the authority to dictate rules of discovery and rules of admissibility for use in *state* court. In particular, it is at least arguable that Congress lacks the authority to tell this state, or any state, that it "shall not" disclose or admit, in *state* court litigation, "reports ... or data compiled or collected" by a *state* agency (e.g., Pierce County's Public Works Department). Throughout this opinion, we have *assumed* that section 409 is constitutional, because neither party has raised or

briefed that question.

Guillen, 96 Wn. App. at 875 n.26. We granted review on January 5, 2000.

Whitmer

On August 8, 1996, a Ford Taurus driven by petitioner Chin Yuk and owned by petitioner Chang Choi turned from 75th Street West onto Custer Road in Lakewood and collided with a Volkswagen being driven by respondent Denel Whitmer along Custer Road. The intersection was designed with a stop sign on 75th Street, but none on Custer Road for through traffic. Both Denel and her sister Shana Whitmer, a minor, were knocked unconscious and later diagnosed as having sustained brain injuries.

The Whitmer family filed a tort claim against, inter alia, the City of Lakewood and Pierce County for negligent op-

eration of the intersection. In response to interrogatories requesting copies of publicly held materials relating to that intersection's traffic and accident history, the petitioners claimed such materials were privileged under 23 U.S.C. § 409. The Whitmers moved to compel discovery. On August 27, 1998, the trial court denied the Whitmers' motion, ruling that local governments had standing to invoke § 409 and that the privilege covered all of the disputed materials. However, on February 11, 2000, the court reversed its ruling, based on the *Guillen* decision, concluding that *none* of the following documents was covered by the § 409 privilege:

[Section 409 Privilege] Claimed by Pierce County:

1. Multi-file Inventory Listing

Detail: Computer Print out of accident information that would be retained in computer file.

2. Accident Reports - Dated: 9/24/90, 7/21/93, 1/6/96, 6/11/90, 6/9/93, 3/28/90, 5/14/93, 11/13/91, 12/17/94, 9/25/92, 10/11/94, 4/24/92, 9/20/94, 7/31/90, 8/31/94, 4/2/91, 4/29/94, 12/11/92, 2/17/94, 9/25/92, 1/21/94, 9/3/92, 12/9/95, 7/27/92, 12/1/95, 4/24/92, 9/19/95, 3/13/92, 8/22/95, 2/25/92, 3/20/95, 9/24/93, 2/12/95, 4/2/93, 3/11/93, 4/7/93, 10/4/95, 10/6/95, 1/29/93, 4/20/92, 6/2/93, 11/23/94, 12/10/94, 1/27/90, 2/5/90, 4/7/93, 4/30/92, 5/7/92, 5/22/90, 8/4/92, 8/30/90, 11/1/91, 11/15/90, 11/21/91.

3. Computer Prinout of Pages 1990-1996; from 8/8/97 and 7/16/97; containing summary information on dates of accidents.

4. Response to citizen complaint letter: original letter from Margaret Smith to Thomas Ballard; response letter, date 2/8/91 from Thomas Ballard to Margaret Smith concerning light and fixing cost of light at approximately $125,000.

5. Table 1 - 24 - Vehicular Traffic Evaluations and Traffic Signal Warrant Evaluation.

6. Pierce County Public Works Signal Warrant Form.

7. Vehicle Volume Summaries - Dated: 12/11/90, 8/1/88, 11/7/95, 11/8/95, 9/30/93, 7/18/89, 9/21/95, 9/20/95, 6/7/94, 10/14/93, 7/14/92, 10/25/90, 7/18/91, 7/20/89,

7/25/9[sic], 11/28/95, 7/14/92.

8. State of Washington Urban Arterial Board Project Prospectus, revised 1/6/69.

9. Pierce County Six-Year Plans - 1990-1996.

[Section 409 Privilege] Claimed by City of Lakewood:

1. Memo; 5/14/96; from Rory Grindley, Associate Traffic Engineer; to Bill Larkin, Engineering Manager, City of Lakewood; regarding Pierce County Public Works and Utilities Transportation Service Traffic Division Review of McDonald's Restaurant Traffic Impact Analysis.

2. Private Traffic Impact Analysis for Chevron at 74th Street West and Lakewood Drive; 2/13/96.

3. 75th Street W. and Custer Road (Lakewood Drive) Intersection Evaluation (augmenting Private Traffic Impact Analysis, supra #2); 4/10/96.

4. Private Traffic Impact Analysis for McDonald's at 75th Street W. and Lakewood Drive; 4/30/96.

5. Handwritten extract of accident data for 75th Street W. and Custer Road for the Curve between 74th Street West and 75th Street West for the years of 1994, 95, and 96.

6. Fax cover sheet; 2/12/97; from Grindley; to Larkin; transmitting Pierce County Level of Service calculations for 74th Street West and Lakewood Drive plus "assumed signal

timing info used."

7. Handwritten notes and diagram of Custer Road at Lakewood Drive to 75th Street W. showing "ADT COUNTS PM Peak". 1 page.

8. City of Lakewood Six Year Comprehensive Transportation Program: Amended 1997 & 1998 - 2003.

9. Documents associated with the Urban Arterial Trust Account (UATA)

* Urban Program Application: including "Transportation Improvement Board Funding Application Arterial Inventory Sheet" (two types: representing before and after the project).
* Attachment A--Accident Reduction & Annual Benefit" pert[ai]ning to intersection of 75th Street W. and Lakewood Drive.
* "Attachment B--Annual Benefit Summary Sheet."
* "Transportation Improvement Board controlled Intersection Data Continuation Sheet:" (two types: one pertaining to the intersection of 75th Street W. and Custer Road and one pertaining to both that intersection and the intersection of Lakewood Drive and Custer Road).

CP at 440-41. The trial court also ruled that the § 409 privilege did not cover other requested materials identified as "photographs," "notes," "letters," "mem-

oranda," "bid sheets," "traffic signal priority array summaries," and "cross reference sheets." CP at 443-45.[3] We granted direct review in *Whitmer*, consolidated it with *Guillen*, and requested supplemental briefing from all parties on issues relating to § 409's constitutionality.

ISSUES

(1) Whether Washington law bars disclosure or discovery of accident reports.

(2) Whether materials and data sought by the respondents in these cases were "compiled or collected" pursuant to 23 U.S.C. § 152 such that they would be

[3] None of the materials at issue in *Whitmer* or in *Guillen* was actually reviewed by the respective trial courts in camera or made part of the appellate record under seal.

covered by the federal privilege established by 23 U.S.C. § 409 as amended by Congress in 1995.

(3) Whether Congress exceeded its enumerated powers under the United States Constitution by barring state and local courts from allowing discovery of, or admitting into evidence, collections of state and local traffic and accident materials and data originally created and collected for state or local purposes and essential to the proper adjudication of claims brought under state or local law, simply because such materials and raw facts are *also* collected and used pursuant to a federal mandate to identify especially hazardous traffic sites.

(4) Whether Guillen is entitled to attorney fees under the Public Disclosure Act.

ANALYSIS

We conduct de novo review of summary judgment rulings, considering all facts and reasonable inferences in the light most favorable to the nonmoving party. *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

I

First, we examine whether Guillen's disclosure claims pertaining to accident reports are resolvable under Washington law.[4] In November 1972, Washington voters

---

[4] The Washington Association of Prosecuting Attorneys (WAPA) faults the Court of Appeals' *Guillen* opinion for "fail-[ing] to address the issue of the effect of RCW 46.52.080 on the county's obligation to produce accident reports in response to discovery or public records requests." Br. of Amicus WAPA at 8. The complaint appears to have merit. The RCW 46.52.080 issue was duly raised by Pierce County before the Court of Ap-

(continued...)

approved Initiative Measure No. 276, a "strongly worded mandate for broad disclosure of public records." *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 33-36, 769 P.2d 283 (1989). *See LAWS OF 1973*, ch. 1. "Public record" includes "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any

---

[4](...continued)
peals in *Guillen*, *see* Mot. For Discretionary Review (Dec. 7, 1998) at 2, and the Court of Appeals expressly acknowledged the issue when it granted review. *See* Ruling Granting Review and Consolidating Cases (Jan. 15, 1999) at 2. Yet, without addressing RCW 46.52.080, the Court of Appeals ruled, simply, that "[t]he trial court properly granted Guillen's request for disclosure of accident reports pertaining to the subject intersection." *Guillen*, 96 Wn. App. at 873. The RCW 46.52.080 issue is properly before us.

state or local agency regardless of physical form or characteristics." RCW 42.17.020(36). While "mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." RCW 42.17.010(11). In 1992, the following public policy statement was added to the PDA's "Public Records" section:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. The

> public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

RCW 42.17.251. Thus, as we have previously noted, the PDA's intent was

> nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. RCW 42.17.251. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." Letter to W.T. Barry, Aug. 4, 1822, 9 *The Writings of James Madison* 103 (Gaillard Hunt, ed. 1910).

Progressive Animal Welfare Soc'y v. Univ. Of Wash., 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

In any public disclosure dispute, the

government bears the burden "to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." RCW 42.17.340(1).[5] Pierce County claims that the materials at issue in *Guillen* are exempt from public disclosure under RCW 42.17.260(1):

> Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, *unless the record falls within the specific exemptions of* subsection (6) of this section, RCW 42.17.310, 42.17.315, or other statute which exempts or prohibits disclosure of specific information or records.

---

[5] *See also Cowles Publ'g Co. v. City of Spokane*, 69 Wn. App. 678, 849 P.2d 1271, *review denied*, 122 Wn.2d 1013 (1993); *Tacoma News, Inc. v. Tacoma-Pierce County Health Dep't*, 55 Wn. App. 515, 778 P.2d 1066 (1989), *review denied*, 113 Wn.2d 1037 (1990).

RCW 42.17.260(1) (emphasis added).[6]

Section (j) of RCW 42.17.310, referenced in .260(1), exempts from public disclosure any "[r]ecords which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts." While there was no pending superior court cause stemming from the death of Guillen's wife and injuries to her passengers when he made his PDA re-

---

[6] The term "agency" includes "local agencies," which in turn includes "every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof ..." RCW 42.17.020(1). Petitioners Pierce County and the City of Lakewood are therefore both subject to RCW 42.17.260(1). *See Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993).

quest, we have recognized that the PDA "was not intended to be used as a tool for pretrial discovery[,]" *Limstrom v. Ladenburg*, 136 Wn.2d 595, 614 n.9, 963 P.2d 869 (1998), and have accordingly construed the term "controversy" in RCW 42.17.310(j) as inclusive of past and present litigation as well as "reasonably anticipated" litigation. *See Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993). Given the factual circumstances here, we find that litigation involving Pierce County as a party was reasonably anticipated at the time of Guillen's PDA request. Thus, any materials that would be nondiscoverable in that anticipated litigation under "rules of pretrial discovery for causes pending in the superior courts," such as CR 26(b), would also be exempt from public

disclosure under RCW 42.17.310(j).

Confidentiality of "Accident Reports":

We next consider whether accident reports are subject to PDA requests. The Court of Appeals held that "[t]he trial court properly granted Guillen's requests to disclose ... (d) accident reports sent to the County from citizens involved in accidents at the intersection." *Guillen*, 96 Wn. App. at 874. Had that ruling been made solely in the context of a PDA lawsuit, it would have been in error. RCW 46.52.080 specifically provides:

> All required accident reports and supplemental reports and copies thereof shall be without prejudice to the individual so reporting and shall be for the confidential use of the county prosecuting attorney and chief of police or county sheriff, as the case may be, and the director of licensing and the chief of the Washington state patrol, and other officer or commission as authorized

by law, except that any such officer shall disclose the names and addresses of persons reported as involved in an accident or as witnesses thereto, the vehicle license plate numbers and descriptions of vehicles involved, and the date, time and location of an accident, to any person who may have a proper interest therein, including the driver or drivers involved, or the legal guardian thereof, the parent of a minor driver, any person injured therein, the owner of vehicles or property damaged thereby, or any authorized representative of such an interested party, or the attorney or insurer thereof. No such accident report or copy thereof shall be used as evidence in any trial, civil or criminal, arising out of an accident [with certain exceptions not relevant here].

We have held that the phrase "accident reports and supplemental reports" in RCW 46.52.080 refers to reports prepared pursuant to RCW 46.52.030(1) or .040 by persons involved in the accidents, not to official "police officer's reports" or "investigator's reports" prepared

pursuant to RCW 46.52.030(3) or .070.[7]

Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus., 19 Wn App. 800, 806,

---

[7] *See* RCW 46.52.030(1) ("**Accident reports**. (1) Unless a report is to be made by a law enforcement officer under subsection (3) of this section, the driver of any vehicle involved in an accident resulting in injury to or death of any person or [serious] damage to the property of any one ... shall ... make a written report of such accident ..."); RCW 46.52.040 (requiring vehicle's occupant to prepare the "accident report" if operator is physically incapacitated); *cf.*

RCW 46.52.070 ("**Police Officer's report**. (1) Any police officer of the state of Washington or of any county, city, town or other political subdivision, present at the scene of any accident or in possession of any facts concerning any accident whether by way of official investigation or otherwise shall make report thereof in the same manner as required of the parties to such accident and as fully as the facts in his possession concerning such accident will permit."); RCW 46.52.030(3) ("Any law enforcement officer who investigates an accident for which a report is required under subsection (1) of this section shall submit an investigator's report as required by RCW 46.52.070.")

578 P.2d 59 (1978) (noting RCW 46.52.080 "mandates confidentiality of reports made by persons involved in an accident") (citing *Gooldy v. Golden Grain Trucking Co.*, 69 Wn.2d 610, 419 P.2d 582 (1966)). While these "accident reports" themselves are for the confidential use of certain public officials and exempt from public disclosure, RCW 46.52.080 and .083 entitle parties having "a proper interest" in the accident to disclosure of certain basic data contained in those reports. Guillen, however, does not qualify, since the statue's examples of qualifying parties clearly indicate a restricted understanding of "proper interest" that cannot reasonably be construed to include persons involved in entirely different accidents at the same

location.[8]

---

[8] We note, however, that RCW 46.52.060 mandates that the "number of accidents" at each location, along with their "frequency and circumstances thereof," be "publish[ed]" on a monthly and annual basis. *See* RCW 46.52.060 ("It shall be the duty of the chief of the Washington state patrol to file, tabulate, and analyze all accident reports and to publish annually, immediately following the close of each fiscal year, and monthly during the course of the year, statistical information based thereon showing the number of accidents, the location, the frequency and circumstances thereof and other statistical information which may prove of assistance in determining the cause of vehicular accidents.") RCW 42.17.251 mandates that PDA provisions be "liberally construed," and the term "publish" has been defined as follows: "To make public; to circulate; to make known to people in general. To issue; to put into circulation ... An advising of the public or making known of something to the public for a purpose." *Black's Law Dictionary* 1233 (6th ed. 1990). Thus, while only the public entities identified in the second paragraph of RCW 46.52.060 would be entitled to disclosure of the "accident reports" themselves and any "analysis or reports thereof," RCW 46.52.060 would still entitle Guillen to public disclosure of the following raw data: "the number of

(continued...)

Discovery of "Accident Reports":

Still, simply because such accident reports are "confidential" and not subject to PDA requests does not mean they are "privileged" in the sense of being immune from CR 26, Washington's broad civil discovery rule. In *Mebust v. Mayco Mfg. Co.*, 8 Wn. App. 359, 506 P.2d 326 (1973), the court held that the "confidential" statutory status of certain documents "does not place them beyond the reach of *any* judicial process." *Id.* at 361.[9] It is certainly

---

[8](...continued)
accidents" at the location in question, the "frequency," and the "circumstances thereof."

[9] Whle *Mebust* recognized our holding in *Folden v. Robinson*, 58 Wn.2d 760, 364 P.2d 924 (1961), regarding inadmissibility, the court stressed the need to narrowly circumscribe any privilege and the importance of
(continued...)

true that, under RCW 46.52.080, accident reports are "privileged" *in the sense that* they are inadmissible as evidence at trial. RCW 46.52.080 expressly provides, "No such accident report or copy thereof shall be used as evidence in any trial, civil or criminal, arising out of an accident."[10] But the very fact that this statute expressly bars admission of theese reports as evidence

---

[9](...continued)
maintaining liberal *discovery* rules. *Mebust*, 8 Wn. App. at 361.

[10] It was after citing this provision--*and in this sense*--that we remarked in *City of Seattle v. Gerry*, 76 Wn.2d 689, 458 P.2d 548 (1969), "The report itself was not before the court, nor were any of its details ... That being so, its *privileged nature* was in no way violated." *Id.* at 693 (emphasis added). Our phrase "privileged nature" referred only to admissibility. Whether or not the report was subject to *discovery* was never in question. *See also Gooldy*, 69 Wn.2d at 613-14.

at trial without also barring their pretrial discovery is stong indication that such reports are not "privileged" in the sense of being exempt from CR 26(b)(1). We hold that there is no state law precluding Guillen from being granted pretrial discovery in his tort case of relevant "(d) accident reports sent to the County from citizens involved in accidents at the intersection." *Guillen*, 96 Wn. App. at 874.

II

Secondly, we examine petitioners' claim that the accident reports and other materials and data in *Guillen* and *Whitmer* were "compiled or collected" pursuant to 23 U.S.C. § 152 such that they would be covered by the federal privilege established by 23 U.S.C. § 409

as amended by Congress in 1995. The burden of showing that a privilege applies in any given situation rests entirely upon the entity asserting the privilege. *Calbom v. Knudtzon*, 65 Wn.2d 157, 396 P.2d 148 (1964). In its present form, § 409 reads:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

<u>Legislative Background of § 409:</u> The

application of § 409 is a question of first impression for this court. Other than *Guillen*, there appears to be no Washington, Ninth Circuit, or United States Supreme Court case law involving § 409. We begin our analysis by examing 23 U.S.C. § 152, entitled "Hazard elimination program," one of the three provisions[11] referenced in § 409:

> Each state shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists, bicyclists, and pedestrians, assign priorities for

[11] Pub. L. 93-87, Title II, § 209(a) (Aug. 13, 1973), 87 Stat. 286. The other two statutes referenced in § 409 relate to federal safety improvements programs for rail crossings (§130) and highway bridges (§ 144), not applicable here. Much of the § 409 case law, though, relates to rail crossing data, collected pursuant to § 130 rather than to § 152.

> the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

This 1973 statute apparently had a side effect not intended by Congress. By forcing state and local governments to identify all "public roads" that "may constitute a danger to motorists, bicyclists, and pedestrians," and to rank the most hazardous among them *in writing*, Congress accorded private tort plaintiffs an *added* advantage in their efforts to prove negligent governmental design or maintenance of certain traffic sites. In 1987, Congress enacted 23 U.S.C. § 409 at least in part to address this problem.[12] Although Congress provided no statement of legislative

[12] Pub. L. 100-17, Title I, § 132(a) (Apr. 2, 1987), 101 Stat. 170.

intent, courts have concluded that § 409 was designed to prevent §§ 130, 144 and 152 "from providing an *additional*, virtually no-work tool for direct use in private litigation," *Light v. State*, 560 N.Y.S.2d 962, 149 Misc. 2d 75 (Ct. Cl. 1990) (emphasis added); *see also Perkins v. Ohio Dep't of Transp.*, 65 Ohio App. 3d 487, 584 N.E.2d 794, 802 (1989),[13] and to "'facilitate candor in administrative evaluations of highway safety hazards'" and in the implementation of federally funded safety enhancements. *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992) (quoting *Duncan v. Union*

[13] As originally enacted, § 409 made referenced materials only inadmissible as evidence at trial. *Light*, 560 N.Y.S.2d at 963 (interpreting pre-1991 version of § 409). In 1991, though, Congress amended § 409 so as to make them nondiscoverable as well.

Pacific R.R., 790 P.2d 595, 597 (Utah 1990)).[14]

Early § 409 Case Law: For the next several years, most state courts restricted the application of the fedral privilege established in § 409 to "reports, surveys, schedules, lists, or data" that had been *specifically* created for the purpose of applying for federal safety improvement funding or implementing a funded project. Such decisions often relied on the admonition in *United State v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039

[14] *See Rodenbeck v. Norfolk & W. Ry.*, 982 F. Supp. 620, 624 (N.D. Ind. 1997) (noting that if a government "knows that its candid efforts of persuasion" to secure safety improvement funds "may ultimately be used against it, [that government] will be far less forthcoming in offering any 'data' by which that discretion can be exercised, and indeed may choose not to offer safety suggestions at all.").

(1974), that privileges are "exceptions to the demand for every man's evidence" and are therefore "not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* at 710.[15] These courts voiced strong objection to application of a federal privilege in § 409 to traffic and

---

[15] *See also Trammel v. United States*, 445 U.S. 40, 50, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980):

> Testimonial exclusionary rules and privileges contravene the fundamental principle that "'the public ... has a right to every man's evidence.'" *United States v. Bryan*, 339 U.S. 323, 331[, 70 S. Ct. 724, 730, 94 L. Ed. 884] (1950). As such, [privileges] must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Elkins v. United States*, 364 U.S. 206, 234[, 80 S. Ct. 1437, 1454, 4 L. Ed. 2d 1669] (1960) (Frankfurter, J., dissenting).

accident materials and raw data prepared for state and local purposes simply because they were *also* "collected" for uses related to §§ 130, 144 and 152, an unacceptable outcome ridiculed as "imprudent"[16] and "anomalous."[17]

Shortly after § 409 was enacted, a Louisiana trial court construed the privilege broadly to indlude "'*all information gathered* pursuant to the federal programs covered by this statute.'" *Martinolich v. S. Pac. Transp. Co.*, 532 So. 2d 435, 437 (La. Ct. App. 1988) (emphasis added), *writ denied*, 535 So. 2d 745 (La. 1989), *cert, denied sub nom. La. Dep't of Transp. &*

---

[16] *Palacios v. La. & Delta R.R.*, 682 So. 2d 806 (La. Ct. App. 1996).

[17] *Tardy v. Norfolk S. Corp.*, 103 Ohio App. 3d 372, 659 N.E.2d 817 (1995).

Dev. v. Martinolich, Inc., 490 U.S. 1109, 109 S. Ct. 3164, 104 L. Ed. 2d 1027 (1989). But that ruling was promptly vacated as "clearly wrong." *Id.* Stressing the heavy presumption against federal preemption in an area of law traditionally occupied by states such as "regulation of [a state] court system," *id.* at 438, the Louisiana Court of Appeals adopted a more conservative understanding of § 409:

> Clearly Congress has not endeavored, by way of this statute [§ 409], to occupy the field of Louisiana's evidentiary rules or our Code of Civil Procedure. Where Congressional enactments do not exclude all state legislation in the field, preemption is to the extent of the conflict between them ... Because preemption is not presumed, we construe 23 U.S.C. § 409 restrictively, to intrude only so much as Congress has expressly prescribed.

Id. A few years later, Louisiana's Supreme Court issued *Wiedeman v. Dixie*

Electric Membership Corp., 627 So. 2d 170 (La. 1993), *cert. denied*, 511 U.S. 1127 (1994). Consistent with § 409's perceived legislative purpose, the *Wiedeman* court ruled that the privilege covered *only* the following materials:

(1) surveys to identify hazardous railroad crossings and improve them (§ 130);
(2) applications for federal assistance in replacing or rehabilitating highway bridges (§ 144);
(3) studies assigning priorities and schedules of projects for highway improvement (§ 152); and,
(4) other compilations made for developing highway safety construction projects which would utilize Federal-aid funds (§ 409).

Id. at 173. The court flatly rejected, though, the "expansive interpretation that would protect *data and raw facts*," ruling that the § 409 privilege did *not* include "(1) accident reports; (2)

traffic counts; and (3) other raw data collected by" the governmental agency responsible for identifying and evaluating good candidates for safety enhancement grants. *Id.* (emphasis added). "Section 409 creates a privilege for compilations enumerated in the statute, but the privilege does not extend to reports and data gathered for or incorporated into such compilations." Id.[18]

In *Tardy v. Norfolk S. Corp.*, 103 Ohio

---

[18] *See also Miguez v. S. Pac. Transp. Co.*, 645 So. 2d 1184, 1189 (La. Ct. App. 1994) (finding it "unwise from a practical perspective" to construe section 409 so broadly as "to unilaterally place off limits evidence so vital to the court's quest for the truth," effectively "provid[ing] a drop rug under which a potentially liable party may conveniently conceal its prior misconduct," thereby, "deny[ing] legitimate accident victims the only system of redress available to them.").

App. 3d 372, 659 N.E.2d 817 (1995), the Ohio Court of Appeals agreed with the reasoning of Louisiana's courts, rejecting a railroad company's contention that an expert affidavit describing the number and nature of prior accidents at the railway crossing in question was privileged under § 409:

> If a dozen people had been killed at a site, a trier of fact might reasonably infer that the site was dangerous. These dozen deaths would naturally be included in statistics gathered for inclusion in official reports made pursuant to Section 409. The question then becomes: Does the fact that information of previous accidents at a site is included in reports made under Section 409 make all evidence of the previous accidents inadmissible? We think not. If all accidents are reported and no evidence of prior reported accidents is admissible, a plaintiff could never meet the burden of proof under [Ohio tort law]--an anomalous result.

Id. at 820.

In *Kitts v. Norfolk & W. Ry.*, 152

F.R.D. 78 (S.D. W. Va. 1993), a West Virginia court also construed § 409 narrowly, explaining that the privilege "clearly does *not* accord protection for documents or data prepared or compiled for some entirely separate and distinct purpose, even if the *contents* of the same, or parts thereof, eventually become ingredients thrown into a soup kettle with a distinct flavor of safety enhancement." *Id.* at 81 (emphasis added).

Meanwhile, in Arizona, a wrongful death claim was filed after a train collided with a milk truck driven by Mary Isbell's husband at an uncontrolled railroad crossing. *S. Pac. Transp. Co. v. Yarnell*, 181 Ariz. 316, 890 P.2d 611, 612 (1995). "The state and Southern Pacific argued that [§ 409] exempted

from discovery not only the reports, surveys, schedules, lists, or data compilations made for the purposes identified in the statute, but also all the facts in those reports even if available from other sources." *Id.* The trial court granted the plaintiff's motion to compel, concluding that § 409 "only protected the reports themselves, and not the underlying facts." *Id.* Arizona's Supreme Court agreed:

> Construing the statute to cover all facts that ultimately end up in such compilations, from whatever source derived, would go far beyond protecting the safety enhancement process and indeed would turn that process on its head. It would prevent the parties from proving claims that could otherwise have been proven had there been no safety enhancement project. The [United States] Supreme Court has held that the federal railroad safety enhancement program does not preempt state damage claims.
>
> But state damage claims can only be proved with facts ... *[T]he*

> *breadth of exemption from discovery and admissibility argued by Southern Pacific and the state, and acknowledged by the court of appeals, would sacrifice the state tort scheme on the altar of the federal statutory scheme.*

Id. at 613 (emphasis added) (citing *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993)).[19] Obeserving that each of the

---

[19] In 1961, Washington statutorily waived its absolute sovereign immunity: "The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." RCW 4.92.090. Citing *Kelso v. City of Tacoma*, 63 Wn.2d 913, 390 P.2d 2 (1964), Whitmer argues that, "[a]s a matter of public policy, this attempt by these municipalities to hide evidence of their misconduct would violate the statutory waiver of sovereign immunity applicable to all governmental entities within the State of Washington, and would place governmental tortfeasors above the law and not answerable to our Supreme Court's Civil Rules." CP (*Whitmer*) at 40. While the privilege does not per se

(continued...)

key terms in § 409--"reports," "surveys," "schedules," "lists" and "data"--corresponds to a specific term of art used in §§ 130, 144, and 152,[20] the court held "that the documents exempt from

---

[19](...continued)
violate RCW 4.92.090, the statue does evidence a strong public policy of holding governments accountable for their tortious conduct.

[20] As the *Yarnell* court explained:

> Thus when § 409 refers to "surveys" and "schedules," it is referring specifically to those surveys and schedules prepared pursuant to 23 U.S.C. § 130(d). Similarly, 23 U.S.C. § 144(e) ... requires the federal government to inventory, classify, and prioritize highway bridges and categorizes this as "*data*." (Emphasis added.) And, 23 U.S.C. § 152 (hazardous roads), requires the states to "*survey*" roads, implement a "*schedule*" of projects for improvement, and submit a "*report*" to the federal government on progress being made to implement highway safety improvement projects. 23 U.S.C. § 152(a), (g) (emphasis added).

Yarnell, 890 P.2d at 614.

discovery and excluded from evidence under § 409 are precisely the documents described and prepared under the authority of §§ 130, 144, and 152, and no others." *Id.* at 614. By excluding from the privilege all facts and materials "that ultimately end up in such compilations," the court explained that it hoped to "promote the integrity of the federal regulartory scheme without compromising the integrity of the parallel state tort system." *Id.* at 614-15.[21]

---

[21] Federal courts during this period tended to embrace a more expansive understanding of section 409. In *Robertson v. Union Pac. R.R.*, 954 F.2d 1433 (8th Cir. 1992), the Eighth Circuit held that § 409 "provides a fairly broad exclusion." *Id.* at 1435. The court deemed "without merit" the plaintiff's claim that materials were not privileged if "not collected or utilized *solely* for federal funding projects." *Id.* at 1435 (continued...)

<u>1995 Amendment to § 409:</u> The United States Congress evidently disagreed with such restricted readings of § 409 by state courts, and in 1995 amended the statute by inserting two words after the

---

[21](...continued)
n.3 (emphasis added). Rather, the court held that § 409 covered all materials compiled "'pursuant to Sections 130, 144, and 152'" even if "available for other uses and purposes." *Id.* The Eighth Circuit reiterated its broad construction of § 409 in *Lusby v. Union Pac. R.R.*, 4 F.3d 639 (8th Cir. 1993), where it reversed a trial court that had allowed testimony by an expert who relied on state-held materials such as accident reports, explaining that "state materials do not fall outside the scope of § 409 merely because they are not compiled *solely* for federal reporting purposes and are available for other uses." *Id.* at 641 (emphasis added). The *Lusby* court held that as long as *one* of the reasons for compiling accident reports or other data was for "federal reporting purposes," they were privileged under § 409. *See also Taylor v. St. Louis S.W. Ry.*, 746 F. Supp. 50, 53-54 (D. Kan. 1990); *Harrison v. Burlington N. R.R.*, 965 F.2d 155 (7th Cir. 1992).

word "compiled": "or collected." Lest there be any doubt regarding its intentions in doing so, Congress published an accompanying "clarification" in the Congressional Record:

> This section amends section 409 of title 23 to clarify that *data "collected" for safety reports or surveys* shall not be subject to discovery or admitted into evidence in Federal or State court proceedings.
>
> *This clarification is included in response to recent State court interpretations of the term "data compiled" in the current section 409 of title 23.* It is intended that *raw data* collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mention[ed] or addressed in such data.

H.R. Rep. 104-246 § 328, at 59 (1995) (emphasis added); *see* Act of Nov. 28, 1995, Pub. L. No. 104-59, 1995

U.S.C.C.A.N. (109 Stat.) 591.

State Court Resistance: It is a well-recognized rule of statutory construction that "where a law is amended and a material change is made in the wording, it is presumed that the legislature intended a change in the law." *Home Indem. Co. v. McClellan Motors, Inc.*, 77 Wn.2d 1, 3, 459 P.2d 389 (1969) (citing *Alexander v. Highfill*, 18 Wn.2d 733, 140 P.2d 277 (1943)). However, despite Congress' 1995 amendment and "clarification," a few state courts have understandably remained reluctant to construe § 409 in a manner that effectively creates a legal black hole into which state and local governments can drop virtually all accident materials and facts, simply by showing that such materials and "raw

data" are *also* "collected" and used to identify and rank candidates for federal safety imporvement projects statewide, pursuant to § 130, 144, or 152. *See, e.g., Palacios v. La. & Delta R.R.*, 82 So. 2d 806 (La. Ct. App. 1996) (relying on *Wiedeman* despite Congress' 1995 amendment), *vacated*, 740 So. 2d 95 (La. 1999) (recognizing Congress' intent in 1995 to extend the § 409 privilege to all "collected" data); *Isbell ex rel. Isbell v. State*, 198 Ariz. 291, 9 P.3d 322 (2000) (rejecting claims that Congress' 1995 amendment had undermined its narrow *Yarnell* decision).[22] Still,

---

[22] The respondents also cite *Department of Transportation v. Superior Court (Tate)*, 47 Cal. App. 4th 852, 857, 55 Cal. Rptr. 2d 2 (1996), where the court declined to give § 409 the "broad construction" advanced by the defendants in that case, despite Congress' just-
(continued...)

most state courts have considered themselves obligated by the Supremacy Clause to try to absorb the "harsh" impact on state and local courts of § 409 as amended in 1995. *Coniker v. State*, 695 N.Y.S.2d 492, 495, 181 Misc. 2d 801 (1999).[23]

---

[22](...continued)
enacted 1995 amendment. The court based its ruling on a *factual* finding "[W]hatever its effect, [Congress' 1995 amendment] did not eliminate the express requirement that the information at issue have been compiled or collected pursuant to section 152, a requirement that [the state] has failed to establish in this case." *Id.* at 855 n.2 (emphasis omitted). Here, by contrast, the sworn declarations in the record strongly suggest that *one* of the reasons the petitioner "compiled or collected" the disputed items and data was pursuant to § 152.

[23] *See, e.g., Mackie v. Grand Trunk W. R.R.*, 215 Mich. App. 20, 23-26, 544 N.W.2d 709 (1996); *Rodenbeck v. Norfolk & W. Ry.*, 982 F. Supp. at 621-25; *Reichert v. Dep't of Transp. & Dev.*, 694 So. 2d 193, 198 (La. 1997); *Fry v. S.*
(continued...)

Statutory Application: We turn to the materials at issue in these consolidated cases to determine whether they were "compiled or collected" pursuant to § 152 such that they would be covered by the § 409 privilege as amended in 1995.

According to sworn declarations in the record, even prior to the accident that killed Guillen's wife, Pierce County had specifically collected and reviewed all the disputed accident reports, photos, witness statements, collision diagrams, and other traffic and accident data relating to the intersection of 168th

---

[23](...continued)
Pac. Transp. Co., 715 So. 2d 632, 637 (La. Ct. App. 1998); *Sevario v. State ex rel. Dep't of Transp. & Dev.*, 752 So. 2d 221, 227-31 (La. Ct. App. 1999), *review denied*, 759 So. 2d 760 (La. 2000); *Long v. Dep't. Of Transp. & Dev.*, 743 So. 2d 743 (La. Ct. App.), *review denied*, 751 So. 2d 885 (La. 1999), *cert. denied*, 529 U.S. 1110 (2000).

Street East and B Street East and had then sought § 152 funding to enhance its safety. Mot. for Discretionary Review, App. 8, Ex. A, Decl. of Thomas Ballard at 2. According to Thomas Ballard, Pierce County's Engineer, § 152 safety enhancements were specifically designed for that intersection, and all disputed items in *Guillen* "are reports and data compiled for those purposes." *Id.* Prospectuses compiled based on those collected traffic and accident materials and data were then sent to Washington's Department of Transportation (DOT) "in application for federal-aid highway funds available under 23 U.S.C. § 152." *Id.*

The "public road" at issue in *Whitmer*, while also eligible for consideration

under § 152,[24] had not previously been the subject of an application for § 152 funds. The petitioners contend, however, that § 152's record-keeping mandate was *one* of the reasons they maintained their collections of accident reports, accident photos, correspondence, and otehr raw data relating to that intersection, and that those materials are therefore protected by the § 409 privilege. In a sworn declaration filed in *Whitmer*, Ballard explained how applications for federal § 152 funding are made in practice:

---

[24] *See* 23 U.S.C. § 152(c) ("Funds authorized to carry out this section shall be available for expenditure on--(1) any public road."); 23 U.S.C. § 101(27) ("The term 'public road' means any road or street under the jurisdiction of and maintained by a public authority and open to public travel.").

> I have directed my employees to collect and compile reports, surveys, schedules, lists, and other data for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites or hazardous roadway conditions pursuant to 23 U.S.C. 152 within unincorporated Pierce County which prior to incorporation [by Lakewood in 1996] included the intersection of Custer Road and 75th street.
> ...
> When a new allotment of section 152 money becomes available, the state gives localities such as Pierce County a deadline for identifying roads which are candidates for such funding. As part of the application process, localities need to provide the state specific information about the road in question, which helps the state and federal government prioritize the project and determine whether section 152 funds should be used for the given project. The information on the application includes traffic accidents, traffic counts, narrative descriptions of location, the proposed solutions[,] etc.[,] for the roadway in question. The time frame between notification that section 152 funding is available, and the deadline for the application process, is limited, requiring localities to have studies, reports, and data readily available for purposes of seeking

section 152 funding.

CP at 292-93. According to a Deputy Assistant Secretary at the Washington State Department of Transportation (WSDOT) who supervised § 152 federal hazard elimination grant applications:

> The state requires Pierce County and all other couties[] to designate a primary road system within their counties, and to classify roads based on the volume of traffic, speeds, etc.[] The counties are required to monitor these roads and to collect data, reports and studies so as to determine whether a particular roadway is an appropriate candidate for funding under 23 USC § 152, so as to enhance its safety. The intersection of Custer Road and 75th Street is included within this system, and is eligible for consideration of § 152 funding. The reports, studies, data, etc. compiled for this intersection are considered when evaluating the roads throughout the state which are eligible for § 152 funding and are prioritized accordingly.

CP at 296, Decl. of Wayne T. Gruen, P.E., at 2.

Based upon these sworn declarations in the record, the accident reports, photos, collision diagrams, and other related materials and "raw data" sought by the respondents in these consolidated cases would appear to be *covered* by § 409 as amended in 1995. We simply cannot accept the Court of Appeals' distinction in *Guillen* between collections of traffic and accident rolated materials and raw data "as held" by Pierce County's *Public Works Department*, a local government agency involved in "section 152 activity," and collections of traffic and accident related materials and raw data "as held" by Pierce County's *sheriff's Office*, which the court presumed was in no way involved in "section 152 activity." 96 Wn. App. at 871. We find such a

distinction unsound in principle and unworkable in practice.

Congress' 1995 amendment made clear that § 409 covers all "reports" and "raw data" publicly "collected" for, inter alia, the § 152 purpose of "identi-fy[ing] hazardous locations, sections, and elements ..., which may constitute a danger to motorists, bicyclists, and pedestrians[.]" 23 U.S.C. § 152. Since no one can predict ahead of time *which* "locations, sections, and elements" will distinguish themselves over time as especially "danter[ous] to motorists, bicyclists, and pedestrians" and therefore good candidates for federal safety enhancement funds, § 152 requires jurisdictions to "systematically maintain" complete, *ongoing* collections of all accident related materials and

data on "on public roads." 23 U.S.C. § 152. Thus, § 152's record-keeping mandate requires that Pierce County maintain not only accident materials and data on traffic sites that its Public Works Department has *already* identified as good candidates for § 152 safety enhancement funds, such as the intersection in *Guillen*, but also accident materials and data relating to traffic sites that its Public Works Department has *not yet* identified as hazardous, such as the intersection in *Whitmer*. All such records are "collected" pursuant to § 152.

Furthermore, it cannot be assumed that all state and local governments maintain *multiple* sets of materials such as accident reports, each held by a separate agency for a different use.

While larger jurisdictions might "systematically maintain" one set of accident reports at their law enforcement department and a second set at their "Department of Transportation," or "Public Works Department," smaller jurisdictions would likely have *one* collection of accident reports, photos, and witness statements prepared by their law enforcement personnel, which would be consulted from time to time to identify espcially hazardous sites, as mandated by § 152.

Applying § 409 only to accident reports "as held" by one *agency* of a local government but not "as held" by another, and only to *copies* of a report but not to *originals*, is also unsound and unworkable given the fact that such legal distinctions are already being

rendered meaningless by the electronic revolution underway. As governments everywhere move from paper and microfiche documentation into the age of twenty-first century information technology, public records are increasingly being stored--even *created*- - in *digital* format, then added to virtual databases that are accessed, in streams of bits and bytes, by vast *networks* of governmental agencies, often across juridictional boundaries. Today's technology would already permit a responding law enforcement officer to type up an electronic accident report, complete with accident photographs, collision diagrams, and witness statements, and instantly send those files via satellite to a database accessible by multiple agencies for

multiple purposes, only *one* of which would be to identify particularly hazardous sites in a given jurisdiction that may be good candidates for § 152 safety enhancements.

Under the Court of Appeals' approach, such an electronic database of accident reports would be covered by the § 409 privilege as amended in 1995, even if it were the *only existing collection* of accident reports and data, without which state and local courts could not properly adjudicate a variety of claims brought under state and local law. Were we to rely on the Court of Appeals' distinctions in applying the § 409 privilege, information technology would soon create a situation that the Court of Appeals itself recognized as "absurd," namely, "giv[ing] the County

carte blanche to render immune from discovery every accident report related to a public road within its territory[.]" *Guillen*, 96 Wn. App. at 872.

III

We next turn to the examination of a more fundamental question, raised by the Court of Appeals itself in the final footnote of its *Guillen* opinion, namely, whether the United States Constitution entitles Congress to "tell this state, or any state, that it 'shall not' disclose or admit, in *state* court litigation, 'reports ... or data compiled or collected' by a *state* agency (e.g., Pierce County's Public Works Departments)." 96 Wn. App. at 875 n.26. Specifically, we consider whether the 1995 amendment to 23 U.S.C. § 409 is

constitutional and thus enforceable in state and federal courts, a question requiring analysis of federal preemption of state law, private parties' standing to raise federalist challenges, and the limits of Congressional power.

(a) Express Preemption: There is a strong presumption against federal preemption of state police powers, and such presumption is even stronger in areas of the law where states have traditionally exercised their sovereignty. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 79, 896 P.2d 682 (1995). Deciding what materials or data are discoverable or admissible in cases brought in state court under state law is unquestionably an area where states have traditionally exercised their sovereignty. Still, "that presumption

can be overcome if Congress intends that the federal law preempt state law." *All-Pure Chem. Co. v. White*, 127 Wn.2d 1, 5, 896 P.2d 697 (1995).[25]

Here, Congress clearly intended that the § 409 privilege preempt state laws and court rules governing pretrial discovery and the admissibility of evidence at trial. Not only does the

---

[25] *See also Stevedoring Servs. v. Eggert*, 129 Wn.2d 17, 23, 914 P.2d 737 (1996); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977) ("Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, *see, e.g.*, U.S. Const., art. I, § 10; *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345, 358[, 18 S. Ct. 862, 867, 43 L. Ed. 191] (1898), 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230[, 67 S.CT. 1146, 1152, 91 L. Ed. 1447] (1947).").

statute begin with the words, "Notwithstanding any other provisions of law," but it specifically declares that the privilege is applicable in "Federal or State court." Such language leaves no doubt that this federal statute was designed to be expressly preemptive. *See Dep't of Transp. v. Superior Court (Tate)*, 47 Cal. App. 4th 852, 854, 55 Cal. Rptr. 2d 2, 4 (1996); *Martinolich v. S. Pac. Transp.*, 532 So. 2d at 437.

However, state law cannot be preempted by an unconstitutional federal law. The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or

> laws of any state to the contrary notwithstanding.

Thus, state judges are consitutionally required only to uphold "laws of the United States *which shall be made in pursuance [of the United States Constitution]*." U.S. Const. art: VI, cl. 2 (emphasis added).[26] Federal laws that

---

[26] The petitioners cite several § 409 cases that find express preemption controlling under the Supremacy Clause, but only *after* implicitly or explicitly finding § 409 consitutional. *See, e.g., Claspill v. Mo. Pac. R.R.*, 793 S.W.2d 139, 140-41 (Mo.) (en banc), *cert. denied*, 498 U.S. 984 (1990); *Sawyer v. Ill. Cent. Gulf R.R.*, 606 So. 2d 1069, 1073-74 (Miss. 1992) (resting on Supremacy Clause to reject plaintiff's argument that "the federal government has no authority to tell us what rules of evidence to enforce in the courts of this state"); *City of Atlanta v. Watson*, 267 Ga. 185, 475 S.E.2d 896, 903-04 (1996) (holding that "when a statute that has evidentiary implications is part of a larger federal statutory scheme, the Supremacy Clause demands that states adhere to the statute. To hold otherwise defeats a significant

(continued...)

exceed Congress' enumerated constitutional powers are unenforceable in state court--just as they are in federal court--whether or not Congress intended its laws to preempt "the Constitution or laws of any state." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991).

(b) Standing: We next consider the issue of standing. Several courts have

---

[26](...continued)
purpose of the federal act and cannot be justified in light of the Supremacy Clause.") (citing pre-1995 cases such as *Yarnell*, *Sawyer*, *Wiedeman*, and *Claspill*); *Long v. Dep't of Transp. & Dev.*, 743 So. 2d 743 (citing U.S. Const. art. VI, cl. 2; *Jones v. Rath Packing Co.*, 430 U.S. at 525). Some of these are pre-1995 cases, and it is uncontested that Congress had authority to enact § 409 in its *pre*-1995 form, insofar as the privilege was understood to apply only to materials and data created *exclusively* to comply with the federal government's mandates.

recognized, explicitly or implicitly, that private parties have standing to challenge the constitutionality of federal laws on federalist grounds, even when not joined by a state government. *See, e.g., Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1033 n.6 (11th Cir. 1992); *Atlanta Gas Light Co. v. United States Dep't of Energy*, 666 F.2d 1359, 1369 n.16 (11th Cir. 1982) (citing *Helvering v. Davis*, 301 U.S. 619, 637, 640, 57 S. Ct. 904, 81 L. Ed. 1307 (1937); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 573, 585, 57 S. Ct. 883, 81 L. Ed. 1279 (1937)); *but see Vt. Assembly of Home Health Agencies, Inc. v. Shalala*, 18 F. Supp. 2d 355, 370-71 (D. Vt. 1998). As Justice O'Connor commented in dicta in *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L.

Ed. 2d 120 (1992):

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the puclic officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism securies to citizens the liberties that derive from the diffusion of sovereign power."

Id. at 181 (quoting *Coleman v. Thompson*, 501 U.S. 722, 759, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (Blackmun, J., dissenting)).

> Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials. An analogy to the separation of powers among the branches of the Federal Government clarifies this point. The Contsitution's division of power among the three branches is violated where one branch invades the territory of another, *whether or not*

> *the encroached-upon branch approves the encroachment.*

New York, 505 U.S. at 182 (emphasis added). We agree with this reasoning and hold that private respondents are not deprived of standing to challenge the constitutionality of a federal law on federalism grounds simply because state officials oppose the challenge.

(c) Enumerated Powers: Finally, we examine the merits of the federalism challenge. The final provision of the Bill of Rights guarantees that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. While the Tenth Amendment was once viewed as little more than a meaningless

truism, *see United States v. Darby*, 312 U.S. 100, 124, 61 S. Ct. 451, 85 L. Ed. 609 (1941), the United States Supreme Court has recently signaled a renewed commitment to enforcing the principle of dual sovereignty implicit in the American constitutional framework and made explicit in the Tenth Amendment,[27] stressing that "[t]he Constitution created a Federal Government of limited powers." *Gregory*, 501 U.S. at 457. As James Madison explained prior to the Constitution's ratification:

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite ... The powers reserved to the several States will extend to

---

[27] *See, e.g.*, Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 Harv. J.L. & Pub. Pol'y 95 (1998).

> all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

The Federalist, No. 45 (James Madison) at 313 (Jacob E. Cooke ed. 1961). Alexander Hamilton predicted that federalism would enhance America's democracy by creating additional checks and balances:

> Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition toward the General Government. The people, by throwing themselves into either scale, will infallibly make it preponderate. *If their rights are invaded by either, they can make use of the other, as the instrument of redress.*

The Federalist, No. 28 (Alexander Hamilton) at 179 (Jacob E. Cooke ed. 1961) (emphasis added). The Court recently remarked about Hamilton's

statements:

> One fairly can dispute whether our federalist system has been quite as successful in checking [Federal] government abuse as Hamilton promised, but there is no doubt about the design. If this "double security" is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.

Gregory, 501 U.S. at 459.[28] Of course, as the Court noted,

> The Federal Government holds a decided advantage in this delicate balance; the Supremacy Clause ... As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.

Id. at 460. Lightly or not, Congress has exercised this "extraordinary power" to such an extent in the past several decades that the highest court in the judicial branch of the *federal* government has found it necessary in a string of recent cases to invalidate laws that the federal government lacked constitutional authority to impose on the states.[29]

---

[28] *See also Gregory*, 501 U.S. at 458 (noting that enforcement of a "balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front," just as the balance of power among the branches of the federal government does).

[29] *See, e.g., New York v. United States*, 505 U.S. 144 (holding Congress lacked the power to enact "take title" provision of Low-Level Radioactive Waste Policy Act); *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (holding that Gun-Free School Zones Act exceeded Congress' power); *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) (holding that Congress lacked

(continued...)

While duly enacted federal legislation is presumed constitutional, that presumption can be rebutted "upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607, 120 S. Ct. 1740, 146 L. Ed. 2d 658

---

[29](...continued)
authority under Indian commerce clause to abrogate states' Eleventh Amendment immunity); *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) (holding that Congress could not require state officers to conduct background checks on prospective handgun purchasers under Brady Handgun Violence Prevention Act); *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997) (holding that Freedom Restoration Act exceeded Congress' Fourteenth Amendment enforcement powers); *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) (holding Congress could not subject state to suit in state court under Fair Labor Standards Act without its consent); *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) (invalidating civil remedy provision of Violence Against Women Act as exceeding commerce power).

(2000). We therefore evaluate whether Congress acted outside its enumerated powers when it amended 23 U.S.C. § 409 in 1995. The petitioners argue that Congress had the power to enact the 1995 amendment under the Spending Clause,[30] the Commerce Clause,[31] and the Necessary and Proper Clause.[32]

(1) Spending Clause: The Spending Clause entitles Congress "to pay the

---

[30] Lakewood's Opening Br. at 21; Pierce County's Opening Br. (*Whitmer*) at 25-26 (passim); Lakewood's Reply Br. at 13-14; Pierce County's Suppl. Br. re: Federal Preemption (*Guillen*) at 4-10; Pierce County's Reply Br. (*Guillen*) at 3-5.

[31] Lakewood's Opening Br. at 15-21; Lakewood's Reply Br. at 5-13; Pierce County's Suppl. Br. re: Federal Preemption (*Guillen*) at 10-11; Pierce County's Reply Br. (*Guillen*) at 5-6.

[32] Pierce County's Suppl. Br. re: Federal Preemption (*Guillen*) at 11-12; Pierce County's Reply Br. re: Federal Preemption (*Guillen*) at 6-7.

debts and provide for the common defense and general welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Over the years, Congress has often sought to influence state behavior by conditioning the receipt of federal funds upon behavioral changes. The United States Supreme Court has declared such a practice constitutional, *see United States v. Butler*, 297 U.S. 1, 66, 56 S. Ct. 312, 80 L. Ed. 477 (1936), *provided* Congress' conditions are "relevant" and "reasonably related" to a *federal* interest in a *specific* national project or program. *South Dakota v. Dole*, 483 U.S. 203, 208, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987). In *Dole*, the Court held that 23 U.S.C. § 158 was constitutional, finding that conditioning receipt of federal highway

funds on state enactment of minimum driking age laws was a proper exercise of Congress' spending power. The Court noted, though, that the "spending power is of couse not unlimited, but is instead subject to several general restrictions articulated in our cases." *Id.* at 207 (citation omitted).

> [First,] the exercise of the spending power must be in pursuit of "the general welfare." In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously ..." Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." *Massachusetts v. United States*, 435 U.S. 444, 461[, 98 S. Ct. 1153, 1164, 55 L. Ed. 2d 403]

(1978) (plurality opinion).[33] *See also Ivanhoe Irrigation Dist. v. McCracken*, [357 U.S. 275, 295, 78 S. Ct. 1185, 2 L. Ed. 2d 1313 (1958)], ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof"). Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

Id. at 207-08 (some citations omitted).[34]

---

[33] "We have repeatedly held that the Federal Government may impose appropriate conditions on the use of federal property or privileges and may require that state instrumentalities comply with conditions that are *reasonably related to the federal interest* in particular national projects or programs." *Massachusetts v. United States*, 435 U.S. 444, 461, 98 S. Ct. 1153, 55 L. Ed. 2d 403 (1978) (emphasis added).

[34] In her dissent in *Dole*, Justice O'Connor agreed "that there are four separte types of limitations on the spending power," but argued that the majority's "application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory

(continued...)

---

[34](...continued)
and unconvincing." 483 U.S. at 213 (O'Connor, J., dissenting).

> When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced.

Id. at 215 (O'Connor, J., dissenting). She argued that Congress is only authorized under the Spending Clause to "'specif[y] how the money should be spent.'" *Id.* at 216 (O'Connor, J., dissenting) (quoting Br. for Nat'l Conf. Amici Curiae). "'A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers.'" *Id.* Indeed, she warns,

> If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources

(continued...)

The petitioners rely on the Spending Clause as a source of congressional authority to enact 23 U.S.C. § 409. In *Martinolich*, cited *supra* at 18, the Louisiana Court of Appeals applied the *Dole* Court's four-part test and concluded that § 409 was authorized under the Spending Clause:

> A state' regulation of its court system is in our opinion as fundamental a function of its sovereignty as the normal exercise of its police power even in matters concerning the health and safety of its citizens. Congress' intrusion, in this instance, however, is constitutionally permissible because Louisiana's participation in the federal funding scheme is voluntary; because the imporvement of state highways with federal funds is in pursuit of "[providing] for the general welfare" as provided in U.S. Const. Art. I, § 8, cl. 1 ("spending power"); because it is clear that participation in the funding program requires acquiescence to the intrusion; and, finally, because the intrusion is related to a valid federal interest (inasmuch as 23 U.S.C. § 409 encourages participation in a scheme that ensures, by prioritization, deliberative spending of federal funds).

Martinolich, 532 So. 2d at 438 (citing *Dole*, 483 U.S. at 207-08). The *Martinolich* court, though, was asked to analyze Congress' power to enact 23 U.S.C. § 409 in its *pre*-1995 form, when by its own terms the privilege applied only to materials specifically "*compiled*," or created, pursuant to §§ 130, 144, and 152. The connection to a

---

[34](...continued)
of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self imposed." *United States v. Butler* [297 U.S. at 78]. This, of course, as *Butler* held, was not the Framers' plan and it is not the meaning of the Spending Clause.
Id. at 217 (O'Connor, J., dissenting).

federal purpose was therefore clear: *but-for* the federal mandates, such materials would not exist. Here, by contrast, we must decide whether the Spending Clause authorizes Congress to bar state courts from permitting discovery of accident reports and other traffic and accident materials and data prepared for state and local purposes, simply because those publicly held materials are *also* "collected" and used for federal purposes. We conclude that it does not.

While the Spending Clause entitles Congress to offer states the option of accepting federal funds "with strings attached"--even when those "strings" interfere with the basic functioning of state government, as they do here--the United States Supreme Court has made it

clear that Congress may do so only if those "strings" are also firmly "attached" to a legitimate federal interest in a specific federal project or program. *See Dole*, 483 U.S. at 208.[35] We find that no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and

---

[35] While 23 U.S.C. § 145 "protect[s] state sovereignty," *see* 23 U.S.C. § 145(a) ("The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed."), the federal mandates at issue *here* do not appear to be similarly discretionary. *See* 23 U.S.C. § 152(a)(1) ("Each State shall conduct and systematically maintain [a survey of all public roads, etc.] ..."); 23 U.S.C. § 409 ("Notwithstanding any other provision of law ..., [identified materials] shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes.").

discovery in state court of accident reports and other traffic and accident materials and "raw data" that were originally prepared for routine state and local purposes, simply because they are "collected," for, *among other reasons*, pursuant to a federal statute for federal purposes.

(2) Commerce Clause: Congress has authority "[t]o regulate commerce ... among the several states." U.S. Const. art. I, § 8, cl. 3. The United States Supreme Court has repeatedly redefined the limits of that power "as our Nation has developed." *United States v. Lopez*, 514 U.S. 549, 552-57, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995).

In *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), the Court found that

Congress lacked Commerce Clause authority to apply the Fair Labor Standards Act's federal minimum wage and maximum hour provisions to state and local government employees, because the law effectively displaced state authority in "areas of traditional governmental functions." *Id.* at 852. The Court explained:

> If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States "'separate and independent existence.'" *Coyle*, 221 U.S., at 580, 31 S. Ct., at 695. ... Congress has sought to wield its power in a fashion that would impair the States' "ability to function effectively in a federal system," *Fry*, 421 U.S., at 547 n.7, [95 S. Ct., at 1796]. This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States'

> freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.

Id. at 851-52.[36]

Less than a decade later, in a 5-4 majority opinion, the Court overturned *National League of Cities* as "unsound in principle and unworkable in practice." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546. 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985).

> [T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Id. at 554. The *Garcia* Court thus embraced James Madison's faith that the federal government "will partake sufficiently of the spirit [of the States] to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." *The*

---

[36] Notably, the following year in *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), the Court indicated that it thought that internal state procedures such as the determination of evidentiary rules deserved deference under the federalist framework as an area traditionally regulated by states:

> [W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion."

Id. at 201 (quoting *Speiser v. Randall*, 357 U.S. 513, 523, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958); *Leland v. Oregon*, 343 U.S. 790, 798, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934)).

Federalist, No. 46 (James Madison) at 319 (Jacob E. Cooke ed. 1961).[37]

> [T]he principal and basic limit on the federal commerce power is that inherent in all congressional action--the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that [federal] laws that unduly burden the States will not be promulgated.

Garcia, 469 U.S. at 556.[38] Chief Justice Burger and Justices Powell, Rehnquist and O'Connor warned in dissent that the majority's decision "substantially alters the federal system embodied in the Constitution." *Id.* at 557 (Powell, J., dissenting). Although *Garcia* has not been formally overruled, its precendential authority has been fundamentally eroded by recent decisions such as *Lopez*

---

[37] Madison argued that fears of "ambitious encroachments of the Federal Government, on the authority of the State governments" were unjustified, since elected members of state and federal governments represented the people, and states would band together to combat any such encroachments just as Americans did to combat British tyranny in 1776. *The Federalist Papers*, No. 46, at 320.

> Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combination in short would result from an apprehension of the federal, as was produced by the dread of a foreign yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case, as was made in the other. But what degree of madness could ever drive the Federal Government to such an extremity?

[38] In 1990, the Missouri Supreme Court relied on *Garcia* to reject claims that 23 U.S.C. § 409 constituted an unconstitutional federal regulation of internal state court procedures. *Claspill v. Mo. Pac. R.R.*, 793 S.W.2d 139. The court held that, under *Garcia*, "states must depend on the national political process for their tenth amendment protections." *Id.* at 141. Since Missouri had not been "deprived of any right to participate in the national political process," *id.*, Claspill's federalism challenge failed.

and *Morrison*.

In *Hodel v. Indiana*, 452 U.S. 314, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981), a pre-*Garcia* case that does not appear to have been similarly undermined, the Court applied a nexus test to challenges to the reach of congressional authority via the Commcerce Clause:

> A complex regulatory program such as established by the [Surface Mining] Act can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfied this test.

Id. at 329 n.17 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303-04, 85 S. Ct. 377, 13 L.

Ed. 2d 290 (1964)).

The Court applied the Commerce Clause nexus requirement more recently in *Lopez*.

> First, Congress may regulate the use of the channels of interstate commerce ... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate acitivties ... Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at 558-59 (citations omitted). The Court then examined the Gun-Free School Zones Act's official Commerce Clause *rationale*--that the presence of firearms around schools adversely affected the quality of education, thereby adversely affecting future interstate commerce--and

concluded that the requisite nexus to interstate commerce activity was missing. *Id.* at 564-67.

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action ... The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated ..., and that there never will be a distinction between what is truly national and what is truly local ... This we are unwilling to do.

Lopez, 514 U.S. at 567-68.

The Court reiterated that same fundamental respect for state sovereignty in *Morrison*, where a provision of the Violence Against Women

Act was declared unconstitutional for lack of sufficient nexus for interstate commerce:

> Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childbearing on the national economy is undoubtedly significant ... Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.

Morrison, 529 U.S. at 615-16. "The Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 617-18.

Here, Lakewood argues that Congress has the power under the Commerce Clause to regulate "Federal-aid road systems, which undoubtedly are channels and instrumentalities of interstate

commerce, as well as road systems within this state that substantially affect interstate commerce." Lakewood's Opening Br. at 16. For support, the City cites 23 U.S.C. § 101(b):

> It is hereby declared to be in the national interest to accelerate the construction of the Federal-aid highway systems, including The Dwight D. Eisenhower System of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce, for the national and civil defense.
>
> ...
>
> It is further declared that since the Interstate System is now in the final phase of completion it shall be the national policy that increased emphasis be placed on the construction and reconstruction of the other Federal-aid systems in accordance with the first paragraph of this subsection [quoted above], in order to bring all of the Federal-aid systems up to standards and to increase the safety of these systems to the maximum extent.

23 U.S.C. § 101(b). Certainly, a sufficient nexus exists between

interstate commerce and the Federal-aid highway system to justify the "regulatory scheme when considered as a whole." Hodel, 452 U.S. at 329 n.17.

However, under *Hodel*, we must also determine whether the "challenged provisions are an integral part of the regulatory program." *Id.* As discussed above, § 409 in its pre-1995 form was evidently designed to *promote administrative candor* in the application for, and implementation of, federal safety enhancement funds, *Coniker*, 695 N.Y.S.2d at 495; *Robertson*, 954 F.2d at 1435, and to prevent federal mandates "from providing an *additional*, virtually no-work tool, for direct use in private litigation." *Light*, 560 N.Y.S.2d at 965 (emphasis added). It is therefore entirely reasonable that the privilege

should cover "reports," "surveys," "schedules," "lists" and "data" that would not exist *but-for* 23 U.S.C. §§ 130, 144, and 152. *See Yarnell*, 890 P.2d. at 614. However, we fail to see how those vital federal purposes are reasonably served by also barring the discovery and admissibility in state court of routinely prepared state and local traffic and accident materials and data that would exist even had a federal safety enhancement program never been created, such as collision photographs, traffic counts, citizen complaint letters, and "raw data" relating to the history of a local traffic intersection. Such a broad privilege lacks the requisite nexus to § 409's raison d'etre and cannot reasonably be characterized as an "integral part" of the Federal-aid

highway system's regulation. *Hodel*, 452 U.S. at 328 n.17.

(3) Necessary and Proper Clause:

Lastly, petitioners suggest that the 1995 amendment to § 409 was duly authorized by the Necessary and Proper Clause, which gives Congress the authority to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Const. art. I, § 8, cl. 18. In his concurrence in *Heart of Atlanta Motel, Inc.*, 379 U.S. 241, Justice Black explained that

> it has long been held that the Necessary and Proper Clause, Art. I, § 8, cl. 18, adds to the commerce power of Congress the power to regulate local instrumentalities operating within a single State if their activities burden the flow of commerce among the States.

379 U.S. at 271.

Pierce County claims that Congress had the power to amend § 409 as it did in 1995, "because, in order to encourage states to identify roads in need of Hazard Elimination funds, it deemed it necessary to protect raw data collected or compiled in making that evaluation from being used against municipalities in highway accident litigation." Pierce County's Suppl. Br. (*Guillen*) at 12. But while the federal government enjoys authority to require state courts to enforce a federal privilege protecting materials that would not have been created but-for federal mandates such as those in §§ 130, 144, and 152, we conclude that it was neither "necessary" nor "proper" for Congress in 1995 to extend that privilege to traffic and accident materials and raw data created

and collected for state and local purposes, simply because they are *also* collected and used for federal purposes.[39]

Unconstitutional Violation of State Sovereignty: While Congress was authorized under its enumerated powers to enact 23 U.S.C. § 409 in its *pre*-1995 form, we find that its 1995 amendment of that statute cannot be characterized as a valid exercise of any power constitutionally delegated to the federal government. Absent a valid and compelling federal interest, which petitioners have not identified here, Congress fundamentally lacks authority

---

[39] *See also Printz*, 521 U.S. at 923-24 (holding that the Necessary and Proper Clause cannot be used to justify a federal law that "violates the principle of state sovereignty").

to intrude upon state sovereignty by barring state and local courts from admitting into evidence or allowing pretrial discovery of routinely created traffic and accident related materials and "raw data" created and held by state and local governments and essential to the proper adjudication of claims brought under state and local law, simply because such collections *also* serve federal purposes. *See Tardy*, 659 N.E.2d at 820; *Kitts*, 152 F.R.D. at 81. As most state courts recognized shortly after Congress enacted § 409 in 1987, applying the § 409 privilege to any and all materials and "raw data" being *collected* by state and local agencies "for the purpose of identifying ... potential accident sites, hazardous roadway conditions, or railway-highway

crossings, pursuant to §§ 130, 144, and 152" would have the unacceptable effect of "sacrific[ing] the state tort scheme on the altar of the federal statutory scheme." *Yarnell*, 890 P.2d at 613. We conclude that Congress' 1995 amendment to § 409 was unconstitutional and is thus unenforceable. *See Morrison*, 529 U.S. at 607-08.

We therefore hold that the federal privilege created by § 409 lawfully applies only to "reports," "surveys," "schedules," "lists" and "data" that are *originally* "compiled"--i.e., created, composed, recorded--for the *specific* purpose of

> identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title, or for the purpose of developing any

> highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.

23 U.S.C. § 409; *see Yarnell*, 890 P.2d at 614. In other words, the privilege only covers:

> (1) surveys to identify hazardous railroad crossings and improve them (§ 130); (2) applications for federal assistance in replacing or rehabilitating highway bridges (§ 144); (3) studies assigning priorities and schedules of projects for highway improvement (§ 152); and, (4) other compilations made for developing highway safety construction projects which would utilize Federal-aid funds (§ 409).

Wiedeman, 627 So. 2d at 173.

If this state court has misconstrued the United States Constitution's limitations upon the federal government's power to intrude upon the exercise of state sovereignty in so fundamental an area of law as the determination by state and local courts

of the discoverability and admissibility of state and local materials and data relating to traffic and accidents on state and local roads, we are confident that the United States Supreme Court will so instruct, as is its constitutional role under our federalist system of government. As James Madison explained shortly prior to the United States Constitution's ratification:

> It is true that in controversies relating to the boundary between the two jurisdictions [i.e., state and federal], the tribunal which is ultimately to decide, is to be established under the general [i.e., federal] Government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality.

The Federalist, No. 39 (James Madison), at 256 (Jacob E. Cooke ed. 1961).

IV

Lastly, we agree with the Court of Appeals that Guillen is entitled to attorney fees under RCW 42.17.340(4), since the record suggests that he was entitled to at least four of the five items to which he was denied access in his PDA case. *Guillen*, 96 Wn. App. at 874.

CONCLUSION

While RCW 46.52.080 bars Guillen from securing public disclosure of accident reports prepared by persons involved in prior accidents at the same intersection, the statute does not prohibit their pretrial discovery. Moreover, only publicly held materials and data that were originally created for the identification, evaluation, planning, or development of federally

funded safety enhancement projects under 23 U.S.C. §§ 130, 144, or 152 are lawfully privileged under 23 U.S.C. § 409, and thus also exempt from public disclosure under RCW 42.17.310(j). Because the record contains insufficient facts to apply this standard to all of the disputed items, we vacate the lower courts' rulings and remand for supplementation of the record and further proceedings not inconsistent with this opinion.

/s/ Bridge, J.

WE CONCUR:

/s/ Sanders, J.

/s/ Smith, J.

/s/ Ireland, J.

/s/ Guy, J.P.T.

No. 68535-5

MADSEN, J. (concurring)--Privileges are the exception, not the rule, and therefore, they are "not lightly created nor expansively construed, for they are in derogation of the search for the truth." *United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). Today our court sidesteps this admonition and construes 23 U.S.C. § 409 in a sweeping manner, far beyond that intended and, most importantly, dictated by Congress. While I concur in the result of the majority, I do so only because the majority, not entirely comfortable with its own result, determined that *its own interpretation*

of § 409 exceeds Congress' authority under the Tenth Amendment, and therefore, refused to enforce its own expansive interpretation.

In 1973, Congress enacted 23 U.S.C. § 152, which establishes a voluntary national funding program for enhancement of dangerous roadways, requiring states to identify hazardous locations and prioritize them for correction. 23 U.S.C. § 152. To thwart an unintended and unsavory result of § 152--that private plaintiffs might gain a work free "tool" to use in civil litigation--Congress enacted 23 U.S.C. § 409, which lies at the heart of this dispute. *See Coniker v. State*, 695 N.Y.S.2d 492, 181 Misc. 2d (Ct. Cl. 1999).

Section 409 currently reads:

> Notwithstanding any other

provision of law, reports, surveys, schedules, lists, or data *compiled or collected for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title* or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409 (emphasis added). In 1995, Congress added the term "collected" to § 409, thus making inadmissible in court, those materials "compiled or collected" for purposes of § 152. Congress was clear in its intent regarding this amendment:

> This section amends section 409 of title 23 to clarify that data

> "collected" for safety reports or surveys shall not be subject to discovery or admitted into evidence in Federal or State court proceedings.
>
> This clarification is included in response to recent State court interpretations of the term "data compiled" in the current section 409 of title 23. It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mention[ed] or addressed in such data.

H.R. Rep. 104-246 § 328, at 59 (1995).

I agree with the majority that this amendment was intended to make a "change" in § 409. Majority at 22; *See Home Indem. Co. v. McClellan Motors, Inc.*, 77 Wn.2d 1, 3, 459 P.2d 389 (1969). However, I disagree with the majority as to the import of that change. Under the majority's holding, original police reports prepared for

purposes unrelated to § 152, become privileged, even in the hands of the party that created them, once they have been "collected" by any entity for purposes of § 152. Majority at 22. Contrary to the majority's assertions, this was not the result intended by Congress, nor is it a holding dictated by any decisional law.

This point is easily shown by examining: (1) the well settled purpose behind § 409; (2) how state courts partially undermined that purpose prior the 1995 amendment; (3) how the 1995 amendment can be logically read to bring the interpretation of § 409 back in line with its purpose; and (4) what state courts have done since the amendment.

The purpose of § 409 is clear:

> The manifest Congressional intent

> in enacting 23 U.S.C. § 409 was to "foster the free flow of safety-related information by precluding the possibility that such information later would be admissible in civil suits. The interest to be served by such legislation is to obtain information with regard to the safety of roadways free from the fear of future tort actions" (*Perkins v. Ohio Dept. of Transportation*, 65 Ohio App.3d 487, 500, 584 N.E.2d 794, 802; *see also Palacios v. Louisiana and Delta RR*, 740 So.2d 95; *Reichert v. State of Louisiana*, 694 So.2d 193). The statute has the dual effect of (1) facilitating candor in the evaluation of highway safety hazards, and (2) prohibiting federally required record keeping from being used as a tool by civil litigants (*see, Robertson v. Union Pacific RR Co.*, 954 F.2d 1433 (8th Cir. 1992); *Stephens v. Town of Jonesboro*, 642 So.2d 274).

Coniker, 695 N.Y.S.2d at 494-95. This is distilled into one basic and obvious rule: Congress did not want to create a "virtually no-work, tool for direct use in private litigation," *Light v. State*, 560 N.Y.S.2d 962, 965, 149 Misc. 2d 75

(Ct. Cl. 1990). In essence, Congress did not want any party involved in litigation to be better off, or for that matter worse off, by reason of a State's participation in seeking § 152 funding.

State courts began to undermine this purpose by giving § 409 an unduly narrow construction. An examination of one of the leading state court opinions on the proper scope of section 409 during the period preceding the 1995 amendment shows the limited construction of § 409 that Congress was aiming to overturn by its amendment. *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So. 2d 170 (La. 1993), *cert. denied*, 511 U.S. 1127 (1994), concerned a plaintiff's discovery requests to the State Department of Transportation and Development (DOTD). Plaintiffs sought

information, such as accident reports, traffic counts, and other raw data collected by the department that was gathered by the DOTD in preparing its applications for federal funding. *Id.* Plaintiffs also sought surveys, compilations, and the actual applications for federal funding.

The Louisiana Supreme Court held that the raw data and reports gathered by the DOTD, which were later incorporated into a report, were not privileged by reason of § 409:

> DOTD argues for an even more expansive interpretation that would protect data and raw facts as well as the written documents incorporating the data. DOTD essentially asks this Court to transform a statute, which by its literal wording protects information *compiled* for certain purposes, into one which protects all information in DOTD's possession. We refuse. The word "compiled" indicates that information is collected into one

document or composed from other sources. [See *Webster's New Collegiate Dictionary* p. 230, (1977).] The term suggests an end product, something more than unedited factual material. Section 409 creates a privilege for compilations enumerated in the statute, but the privilege does not extend to reports and data gathered for or incorporated into such compilations.

> ... A rule which required DOTD to divulge source data but not the end product fosters candor by shielding the state's self-critical evaluations and conclusions from outside scrutiny. It also accords with Louisiana's strong interest in fully and fairly adjudicating matters before its courts and the concomitant need to facilitate open and evenhanded development of the facts underlying a dispute.

Wiedeman, 627 So.2d at 173 (emphasis added). Other state courts construed section 409 in a similar fashion during this period. *See Tardy v. Norfolk S. Corp.*, 103 Ohio App. 3d 372, 659 N.E.2d 817 (1995); *S. Pac. Transp. Co. v. Yarnell*, 181 Ariz. 316, 890 P.2d 611,

cert. denied, 516 U.S. 937 (1995).

In *Wiedeman*, and other similar cases, plaintiffs were attempting to gain information that was "collected" by an agency for purposes of preparing an application for federal funding from the agency that "collected" the information. In none of these cases were plaintiffs seeking information or reports from their original source, such as accident reports from a law enforcement agency. This is a critical distinction, and one that is unnecessarily dismissed as inconsequential by the majority. As illustrated below, it is a distinction that makes sense.

When Congress amended § 409 to include within its scope information that was "collected" it was reacting to decisions like *Wiedeman*. Congress simply "intended

that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence." H.R. Rep. 104-246 § 328 (emphasis added). However, this did not obviate the express statutory requirement that the raw data and information be "collected" pursuant to § 152.

An example illustrates this point, and the flaw in the majority's analysis. Take the simple case of a Pierce County Sheriff's Department officer completing a written accident report for a valid law enforcement purpose (e.g., documenting why a citation was given or an arrest made), a duty regularly performed long before 1973, the year § 152 was originally enacted. Pub. L. 100-17, Title I, section 132(a) (Apr. 2,

1987) 101 Stat. 170; *see* RCW 46.52.060 and accompanying historical information. This report, and others like it, might contain myriad relevant information for a plaintiff pursuing a negligent traffic design claim against the government.

Now, let us assume that these reports are kept on microfiche, and several years later the Pierce County Engineer's Office begins "collecting" copies of these reports, but does not make them "part of any formal or bound report." *See* H.R. Rep. 104-246 § 328. Under section 409, as amended, a plaintiff would not be entitled to have access to the actual documents "collected" by the Pierce County Engineer's Office. Indeed, this would provide a "virtually no-work, tool for direct use in private litigation," *Light*, 560 N.Y.S.2d at 965,

as a litigant would be able to obtain a collection of reports that is part of a work in progress. However, to say that a litigant would not have access to the original reports, still contained on microfiche, from Pierce County is an entirely different matter.

By preventing a litigant from gaining access to information that has been "collected" for purposes of securing federal funding, Congress has made the litigant no better off than they would have been had the State not participated in the funding program, which is the obvious goal of § 409. However, if, as the majority suggests, Congress has prevented a litigant from having access to original reports from their original sources, prepared for purposes unrelated to securing federal funding, then a

litigant would be in a far worse position than if the State did not participate in the funding program. I do not believe that was the result intended by Congress, nor do I believe it is dictated by the language of § 409.

No post-1995 amendment case involves the discovery of original 7reports from the agency creating them for purposes unrelated to the securing of federal funding. Instead, each involves an attempt to gather information already collected or prepared by a state agency, from the agency that "collected" the information for the purpose of securing § 152 funds. *See, e.g., Reichert v. Dep't of Transp. & Dev.*, 694 So.2d 193 (La. 1997) (discovery request to DOTD for documents collected by DOTD); *Mackie v. Grand Trunk W. R.R.*, 215 Mich. App.

20, 544 N.W.2d 709 (1996) (involving "Grade Crossing Report" compiled by Michigan Department of Transportation; decided under pre-amended version of section 409). Not surprisingly, in each instance courts have reached the conclusion that the "collected" information is privileged:

> On November 28, 1995 section 409 was amended to include the words "or collected" after "compiled" to effectively eliminate the admissibility of "[a]ccident reports, traffic counts, and other raw data *collected by the Department*" allowed by the holding in *Wiedeman*. *Id.* This clarification was added in response to recent State court decisions, like *Wiedeman*, that in the view of Congress, misinterpreted the term "data compiled." ... In other words, such information is *collected* or compiled to protect the public by ensuring that safety measures are routinely explored by DOTD without exposing their efforts.

Reichert, 694 So. 2d at 198 (emphasis added).

A narrow construction of § 409 is also supported by several rules of statutory interpretation. The first is that there is a strong presumption against federal preemption, requiring a showing that this is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947). Second, privileges are to be narrowly construed, as they stand in "derogation of the search for truth." *Nixon*, 418 U.S. at 710; *see Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980).

Finally, this Court should be mindful that "where a statue is susceptible of more than one interpretation, some of which may render it unconstitutional, the court will adopt a construction

which sustains the statute's constitutionality, if at all possible." *State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn.2d 493, 500, 816 P.2d 725 (1991). The majority holds that Congress does not have the authority, as a result of the Tenth Amendment, to enact a provision as sweeping as the majority believes § 409 and its subsequent amendment were intended to be. Specifically, the majority states:

> While Congress was authorized under its enumerated powers to enact 23 U.S.C. § 409 in its *pre*-1995 form, we find that its 1995 amendment of that statute cannot be characterized as a valid exercise of any power constitutionally delegated to the federal government.

Majority at 43. Of course, the interpretation of § 409 that I propose does not run afoul of the Tenth Amendment, as is all but conceded by the

majority, since it is a clearly valid exercise of the Federal Spending Power. *Id.* at 36; *see Martinolich v. So. Pac. Transp. Co.*, 532 So. 2d 435, 438 (La. Ct. App. 1988); *Claspill v. Mo. Pac. R.R.*, 793 S.W.2d 139 (Mo.), *cert. denied*, 498 U.S. 984 (1990); *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987).

Because the record before this Court does not permit us to accurately determine whether the disputed documents would be privileged under the correct interpretation of § 409, like the majority, I would remand for further proceedings.

/s/ Madsen, J.

/s/ Alexander, C.J.

/s/ Johnson, J.

THE SUPREME COURT OF WASHINGTON

IGNACIO GUILLEN, as legal guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as legal guardian for PAULINA GUILLEN and FATIMA GUILLEN, Respondents, v. PIERCE COUNTY, a municipal corporation, Petitioner, THE ESTATE OF CLEMENTINA GUILLEN-ALEJANDRE, Defendant.	)	NO. 68535-5
	)	ORDER DENYING FURTHER RECONSIDERATION
ROBERT and LuANN WHITMER, husband and wife, individually, and as the guardians of SHANNA WHITMER, a minor, HANNAH WHITMER, a minor, and DENEL WHITMER, an incapacitated person, Respondents, v. CHIN S. YUK and "JANE DOE" YUK, husband and wife, and the marital community composed thereof, et al., Petitioners.	)	

The Court having entered an order changing opinion in the above cause on November 27, 2001;

Now, therefore, it is hereby ORDERED:

That further reconsideration is denied.

DATED at Olympia, Washington this 27th day of November 2001.

/s/ GERRY L. ALEXANDER
CHIEF JUSTICE

THE SUPREME COURT OF WASHINGTON

IGNACIO GUILLEN, as legal guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as legal guardian for PAULINA GUILLEN and FATIMA GUILLEN, Respondents,

v.

PIERCE COUNTY, a municipal corporation, Petitioner, THE ESTATE OF CLEMENTINA GUILLEN-ALEJANDRE, Defendant.

ROBERT and LuANN WHITMER, husband and wife, individually, and as the guardians of SHANNA WHITMER, a minor, HANNAH WHITMER, a minor, and DENEL WHITMER, an incapacitated person, Respondents,

v.

CHIN S. YUK and "JANE DOE" YUK, husband and wife, and the marital community composed thereof, and CHANG

NO. 68535-5

ORDER CHANGING OPINION

CHOI and "JANE DOE" CHOI, husband and wife, and the community composed thereof; CITY OF LAKEWOOD, a municipal corporation; PIERCE COUNTY, a municipal corporation; and the CITY OF TACOMA, a municipal corporation, Petitioners.

It is hereby ordered that the manuscript opinion of the Court filed in the above cause on September 13, 2001 be changed as follows:

1. Footnote reference number [10] in the ninth line from the top of page 15 and footnote 10 at the bottom of page 15 are deleted.

2. In the 12th line from the top of page 15, footnote reference number [10] is inserted after "CR 26(b)(1)." Footnote 10 is added at the bottom of page 15 as follows:

[10]RCW 46.52.080 would only bar pre-trial discovery of an individual's "accident report" where its discovery to an opposing party would violate the statutory guarantee against "prejudice to the individual so reporting." RCW 46.52.080; *see, e.g., Gooldy*, 69 Wn.2d at 613-14; *City of Seattle v. Gerry*, 76 Wn.2d 689, 698, 458 P.2d 548 (1969). Discovery of the third-party accident reports at issue here, however, would not result in legal prejudice to the individuals who reported their prior collisions at the same intersection. Here, therefore, they are fully discoverable.

Dated this 27th day of November, 2001.

/s/ Alexander, C.J.
Chief Justice

Approved:

/s/ Smith, J. — /s/ Ireland, J.

/s/ Johnson, J. — /s/ Bridge, J.

/s/ Madsen, J. — /s/ Guy, J.P.T.

/s/ Sanders, J. —

THE HONORABLE FREDERICK B. HAYES

SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY

IGNACIO GUILLEN,	)	NO. 96-2-13404-5
Plaintiff,	)	ORDER DENYING
vs.	)	PIERCE COUNTY'S
	)	MOTION FOR
	)	SUMMARY JUDGMENT
PIERCE COUNTY, a	)	AND GRANTING
municipal corporation,	)	PLAINTIFF'S
	)	CROSS-MOTION FOR
Defendant.	)	SUMMARY JUDGMENT
	)	

This matter came before the court on Defendant Pierce County's Motion for Judgment against Plaintiff Ignacio Guillen and also on Plaintiff's Cross-Motions for Summary Judgment regarding production of documents and for Partial Summary Judgment on Fees under RCW 42.17.340. The Court heard oral argument of counsel for Defendant Pierce County and counsel for Plaintiff Ignacio

Guillen. The court considered the pleadings filed in this action and the following evidence:

1. Defendant Pierce County's Motion for Summary Judgment and Memorandum in Support Thereto;
2. Plaintiff's Brief in Opposition to Summary Judgment and Cross-Motion for Summary Judgment;
3. Declaration of Darrel L. Cochran;
4. Pierce County's Rebuttal Brief, with the attached Supplemental Declaration of Thomas G. Ballard;
5. Pierce County's Amended Answer to Plaintiff's Interrogatory No. 1; and
6. Declaration of Susan P. Jensen Regarding the Authenticity of Documents Submitted In Camera. The Court declined to consider

the documents offered by Pierce County for In Camera review. These documents were identified at Items 1, 10, 11, 13, and 15 in Pierce County's Amended Answer to Plaintiff's Interrogatory No. 1.

7. The Third Declaratin of Thomas G. Ballard, P.E.

Based on the evidence presented and the argument of counsel, the Court makes the following findings of fact and conclusions of law:

Based on the findings, it is ORDERED:

1. Defendant Pierce County's motion is denied.

2. Plaintiff Ignacio Guillen's motion for summary judgment is granted with respect to documents identified as 1, 10, 11, 13 and 15, which must be provided by Defendant Pierce County.

Dated this 5 day of Nov, 1997.

/s/ Frederick B. Hayes
JUDGE FREDRICK B. HAYES

Presented by:

GORDON, THOMAS, HONEYWELL, MALANCA
PETERSON & DAHEIM, P.L.L.C.

By /s/ Salvador A. Mungia
Salvador A. Mungia
WSBA No. 14807
Darrell L. Cochran
WSBA No. 22851
Attorneys for Plaintiffs

Copy Received, Approved as to Form,
Notice of Presentation Waived:

JOHN W. LADENBURG
Pierce County Prosecuting Attorney

By /s/ Susan P. Jensen
Susan P. Jensen
WSBA No. 12187
Attorney for Defendant

SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN, Plaintiffs, vs. PIERCE COUNTY, a municipal corporation, and THE ESTATE OF CLEMENTINA GUILLEN-ALEJANDRE, Defendants.	NO. 98-2-06119-2 ORDER DENYING PIERCE COUNTY'S MOTION FOR PROTECTIVE ORDER Hearing Date: October 23, 1998 Assigned Judge: John C. McCarthy

THIS MATTER having come before this Court on Defendant Pierce County's Motion for Protective Order, the Court having reviewed the records and files herein and thereby fully advising itself of the matters involved herein, now, therefore, it is hereby

ORDERED that Defendant Pierce County's Motion for Protective Order is hereby DENIED.

DONE IN OPEN COURT this 23 day of October, 1998.

/s/ John A. McCarthy
THE HONORABLE JOHN C. MCCARTHY

Presented By:

GORDON, THOMAS, HONEYWELL, MALANCA, PETERSON & DAHEIM, P.L.L.C.

By /s/ Darrell L. Cochran
Darrell L. Cochran, WSBA 22851
Juliana T. Kendall, WSBA No. 27778
Attorneys for Plaintiffs

Approved as to Form:

JOHN W. LADENBURG
Prosecuting Attorney

By /s/ Daniel R. Hamilton
Daniel R. Hamilton, WSBA #14658
Deputy Prosecuting Attorney
Attorneys for Defendant Pierce County

SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN, Plaintiffs, vs. PIERCE COUNTY, a municipal corporation, and THE ESTATE OF CLEMENTINA GUILLEN-ALEJANDRE, Defendants.	NO. 98-2-06119-2 ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL DISCOVERY Hearing Date: October 23, 1998 Assigned Judge: John C. McCarthy

THIS MATTER having come before this Court on Plaintiffs' Motion to Compel Discovery, the Court having reviewed the records and files herein and thereby fully advising itself of the matters involved herein, now, therefore, it is hereby

ORDERED that Plaintiffs' Motion to Compel Discovery is hereby GRANTED.

DONE IN OPEN COURT this 23 day of October, 1998.

/s/ John A. McCarthy
THE HONORABLE JOHN C. MCCARTHY

Presented By:

GORDON, THOMAS, HONEYWELL, MALANCA, PETERSON & DAHEIM, P.L.L.C.

By /s/ Darrell L. Cochran
Darrell L. Cochran, WSBA 22851
Juliana T. Kendall, WSBA No. 27778
Attorneys for Plaintiffs

Approved as to Form:

JOHN W. LADENBURG
Prosecuting Attorney

By /s/ Daniel R. Hamilton
Daniel R. Hamilton, WSBA #14658
Deputy Prosecuting Attorney
Attorneys for Defendant Pierce County

SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN, Plaintiffs, vs. PIERCE COUNTY, a municipal corporation, and THE ESTATE OF CLEMENTINA GUILLEN-ALEJANDRE, Defendants.	NO. 98-2-06119-2 AMENDED ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL DISCOVERY Hearing Date: November 20, 1998 Assigned Judge: John A. McCarthy

THIS MATTER having come before this Court on Plaintiffs' Motion to Compel Discovery, the Court having reviewed the records and files herein and thereby fully advising itself of the matters involved herein, now, therefore, it is hereby

ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion to Compel Discovery is hereby GRANTED and the following shall be disclosed by Defendants Pierce County:

1. The identity of all employees, agents, or officials of Defendant Pierce County who have knowledge of automobile accidents taking place at the intersection at issue for the time period January 1, 1990 through July 4, 1996;

2. The identity of all persons within Pierce County's knowledge who have been involved in automobile accidents at the intersection at issue for the time period of January 1, 1990 through July 5, 1996;

3. The identity of all Pierce County deputy sheriffs who patrolled the intersection at issue during the time frame

of January 1, 1990 through July 4, 1996;

4. The date, identity of all persons involved, and the identity of all fatalities for each automobile accident occurring at the intersection at issue for the time period of January 1, 1990 through July 5, 1996;

5. A copy of all photographs, Pierce County has in its possession, control or custody of accidents involving at least one automobile at the intersection at issue from January 1, 1990 through July 6, 1996;

6. A copy of all written statements by witnesses to accidents at the intersection at issue that occurred during the time period of January 1, 1990 through July 6, 1996; and

7. A copy of all accident reports sent to Pierce County from individuals

who had been involved in automobile accidents at the intersection at issue from January 1, 1990 through July 4, 1996.

Defendant Pierce County shall disclose responses to the above-mentioned requests by Monday, December 2, 1998.

DONE IN OPEN COURT this 20 day of November, 1998.

/s/ John A. McCarthy
THE HONORABLE JOHN A. MCCARTHY

Presented By:

GORDON, THOMAS, HONEYWELL, MALANCA, PETERSON & DAHEIM, P.L.L.C.

By /s/ Darrell L. Cochran
Darrell L. Cochran, WSBA 22851
Juliana T. Kendall, WSBA No. 27778
Attorneys for Plaintiffs

Approved as to Form:

JOHN W. LADENBURG
Prosecuting Attorney

By /s/ Daniel R. Hamilton
Daniel R. Hamilton, WSBA #14658

Deputy Prosecuting Attorney
Attorneys for Defendant Pierce County

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN ALMA GUILLEN, Minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN, Respondent, v. THE ESTATE OF CLEMENTINA GUILLEN-ALEJANDRE, Defendant, PIERCE COUNTY, a municipal corporation, Petitioner.	)	No. 24021-1-II RULING GRANTING REVIEW AND CONSOLIDATING CASES

Pierce County seeks review of a Pierce County Superior Court order requiring it to provide information regarding traffic accidents at a certain intersection between January, 1990 and July 1996. The

County contends that this information was collected for the purposes of obtaining federal funding for improvement of the intersection and is therefore exempt from disclosure under 23 U.S.C. § 409. The trial court ruled that Washington's Public Disclosure Act, RCW 42.17, preempts the federal statute. The County asserts that the trial court's decision is obvious or probable error, justifying review under RAP 2.3(b)(1) and (2).

This lawsuit arises from an automobile accident in which Ignacio Guillen's wife was killed and his children and nieces were injured. Thereafter, Guillen filed a complaint seeking disclosure of documents pertaining to the history of the intersection in question. The Superior court ordered disclosure, and the County

appealed. That matter is pending before this court.[1] Four months after the decision in that case, Guillen filed this lawsuit, and again, the superior court ruled that the County must provide the documents sought.

The federal statute, 23 U.S.C. § 409, prohibits the discovery of reports and data compiled or collected for the purpose of identifying and evaluating potential accident sites or for the purpose of developing any highway safety construction improvement project that may be implemented using federal highway funds. In addition, RCW 46.52.080, which establishes the confidentiality of accident reports provided by the individuals involved, provides that such reports

---

[1] See Court of Appeals No. 22614-6-II.

"shall be for the confidential use of the county prosecuting attorney and chief of police or county sheriff, as the case may be, and the director of licensing and the chief of the Washington state patrol and other officer or commission as authorized by law" and that "[n]o such accident report or copy thereof shall be used as evidence in any trial, civil or criminal, arising out of an accident."[2] Additionally, while there is no case on point in Washington, the majority of other jurisdictions report-

---

[2] However, this exemption applies only to those reports generated by individuals. It does not exempt reports generated by the police. See *Gooldy v. Grain Trucking Co.*, 69 Wn.2d 610 (1966). It appears that plaintiffs can also obtain some information under RCW 46.52.060, which requires the Washington state patrol to provide annual reports detailing the number of accidents, their locations, and the circumstances.

ing appear to support the County's interpretation of 23 U.S.C. § 409. See *Lusby v. Union Pacific R.R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993); *Harrison v. Burlington Northern R.R. Co.*, 965 F.2d 155, 158-60 (7th Cir. 1992); *Reichert v. State of Louisiana*, 694 So.2d 193, 198 (La. 1997); *Seaton v. Johnson*, 898 S.W. 2d 232, 235-37 (Tenn. Ct. App. 1995).

Moreover, this same issue is currently pending before this court, and consideration of this case as well would materially advance the termination of the litigation. RAP 2.3(b). Accordingly, it is hereby

ORDERED that review is accepted. This case is consolidated with COA No. 22614-6-II. The motion for discretionary review, the response, and the County's reply are accepted as the briefs in this

matter. The consolidated cases will be argued as one case before a panel of judges on February 4, 1999.

DATED this 15th day of January, 1998.

/s/
Court Commissioner

cc: Honorable John A. McCarthy
Pierce County Superior Court
County Cause No: 98-2-06119-2
Daniel R. Hamilton, Attorney for Appellant
Sal A. Mungia, Attorney for Respondent
Darrell L. Cochran, Attorney for Respondent

Honorable Frederick Hayes
Pierce County Superior Court
County Cause No: 96-2-13404-5
Susan Jensen, Attorney for Appellant
Sal A. Mungia, Attorney for Respondent
Juliana Theresa Kendall, Attorney for Respondent

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,	)	Consolidated: 22614-6-II 23021-1-II
Respondents,	)	PUBLISHED OPINION
v.	)	
PIERCE COUNTY, a municipal corporation,	)	
Petitioner.	)	Filed: August 6, 1999

MORGAN, J. - The question for decision is whether the entire accident history of a Pierce County intersection is exempt from discovery by virtue of 23 U.S.C. § 409. The answer is no.

In May 1995, Pierce County[1] applied for federal highway funds to improve the intersection of 168th Street East and B

Street East. It supported its application with various documents, including:

1. Motor vehicle traffic accidents by location - County of Pierce - prepared by Records Section, Washington State Patrol [WSP], [1/90] - 6/30/96.

10. Collision diagram dated 1/5/89 prepared by Georgia Fischer.

11. Collision diagram dated 7/18/88 prepared by Georgia Fischer.

13. Police Traffic Collision Reports and Motor Vehicle Reports from 1/1/90 prepared by [various] law enforcement agencies.

15. Draft letter to Barbara Gelman from Frederick L. Anderson with note to file signed by Jim Ellison on 3/6/89.[1]

According to the County's Public Works Engineer, item 13 "is a collection of the accident reports for the subject intersection from 1990 through 1996."

---

[1] Clerk's Papers at 20-21.

Item 1 "is a list of those same accidents showing the location, time, date, and nature of the accident." "Items 10 and 11 are collision diagrams prepared by a County employee who is responsible for investigating accidents at the intersection."[2] Item 15 "is the draft of a memorandum from Fred Anderson, then Public Works Director, to Barbara Gelman, then County Council member. It consists of information used for the County's application for federal funds for safety enhancement at the intersection."[3] The records does not contain the documents themselves.[4]

---

[2] Clerk's Papers at 54-55.

[3] Clerk's Papers at 39.

[4] The County asked the trial court to examine the documents in camera, but the trial court refused. The County did not (continued...)

On July 5, 1996, Ignacio Guillen's wife was killed as she drove through the intersection of 168th Street East and B Street East. Her passengers were injured. On July 26, 1996, Pierce County's application for federal funds was granted.

By letters dated August 16 and October 28, 1996, Guillen asked Pierce County to disclose certain accident reports. The reports he wanted described accidents that had occurred at the intersection between 1990 and 1996. His second letter stated in part:

> I want to make the record clear that we are not seeking any reports that were specifically written for de-

---

[4](...continued)
ask the trial court to seal and file the documents for appellate review. The County does not assign error to the trial court's refusal to examine the documents in camera.

> veloping any safety construction improvement project at the intersection at issue. However, on behalf of our clients, we are seeking a copy of all documents that record the accident history of the intersection that may have been used in the preparation of any such reports. In other words, we are simply seeking information as to when accidents have occurred at the intersection for the last ten years. This would include any documents that record (1) the date of any such accidents, (2) the parties involved at each such accident, (3) the date of each such accident, (4) fatalities, if any, at each such accident, (5) the identification of all known [witnesses] at each such accident, (6) copies of photographs taken at each such accident, (7) the configuration of the intersection (what traffic signs existed) at the time of each such [accident], and (8) documents recording traffic counts at the intersection.[5]

The County refused to disclose the requested information.

On December 5, 1996, Guillen sought judicial review pursuant to the Public

---

[5] Clerk's Papers at 93.

Disclosure Act, RCW 42.17.[6] In June 1997,

---

[6] RCW 42.17.340(1) provides:

> Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

RCW 42.17.340(3) provides:

> Judicial review of all agency actions taken or challenged under RCW 42.17.250 through 42.17.320 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

the County made a motion for summary judgment, based on 23 U.S.C. § 409 and the declarations of various officials. The declarations stated that the County's Public Works Department had collected and compiled documents 1, 10, 11, 13 and 15 for use in its 1995-96 application for federal funding. In July 1997, Guillen made a cross-motion for summary judgment.

In September and October 1997, the trial court heard the parties' motions. It was undisputed that a number of accidents had occurred at the intersection, and that law enforcement officers had generated written accident reports. Guillen pleaded orally to the trial court:

> Just give us the accident reports ... We just need to know what accidents occurred here. The accident reports are a police function; they make those when an accident occurs.[7]

The County responded:

> ... [W]e claimed privilege for a stack of accident reports that occurred ... between 1990 and 1996 ...
>
> ... [The reports] were used to create the accident history which was exactly what was required in our 1996 application for [federal] funds.[8]

The trial court granted Guillen's motion and denied the County's. In November 1997, it signed a written order requiring the County to disclose the requested information and pay reasonable attorneys fees pursuant to RCW 42.17.340(4).[9] The County then filed this

---

[7] Report of Proceedings at 6.

[8] Report of Proceedings at 4.

[9] RCW 42.17.340(4) provides:
> Any person who prevails against an agency in any action in the courts
(continued...)

appeal.

On April 10, 1998, during the pendency of the County's appeal from the public disclosure action, Guillen filed a separate negligence action in which he alleged that the County had failed to erect proper traffic controls at the intersection.[10] He also propounded interrogatories seeking the intersection's

---

[9](...continued)
seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he was denied the right to inspect or copy said public record.

[10] There were other plaintiffs also, but they are not material to the issues here.

accident history and related information. The County refused to answer the interrogatories, again citing 23 U.S.C. § 409.

On September 28, 1998, Guillen moved for an order compelling the County to answer his interrogatories. The trial court granted the motion and directed the County to disclose:

> 1. The identity of all employees, agents, or officials of Defendant Pierce County who have knowledge of automobile accidents taking place at the intersection at issue for the time period January 1, 1990 through July 4, 1996;
>
> 2. The identity of all persons within Pierce County's knowledge who have been involved in automobile accidents at the intersection at issue for the time period of January 1, 1990 through July 5, 1996;
>
> 3. The identity of all Pierce County deputy sheriffs who patrolled the intersection at issue during the time frame of January 1, 1990 through July 4, 1996;

4. The date, identity of all persons involved, and the identity of all fatalities for each automobile accident occurring at the intersection at issue for the time period of January 1, 1990 through July 5, 1996;

5. A copy of photographs, Pierce County has in its possession, control or custody of accidents involving at least one automobile at the intersection at issue from January 1, 1990 through July 6, 1996;

6. A copy of all written statements by witnesses to accidents at the intersection at issue that occurred during the time period of January 1, 1990 through July 6, 1996; and

7. A copy of all accident reports sent to Pierce County from individuals who had been involved in automobile accidents at the intersection at issue from January 1, 1990 through July 4, 1996.[11]

On December 7, 1998, Pierce County moved for discretionary review of the

---

[11] Petitioner's Motion for Discretionary Review, Exhibit A-20 (Amended Order Granting Plaintiff's Motion to Compel Discovery dated Nov. 20, 1998).

trial court's order compelling it to answer Guillen's interrogatories. A commissioner of this court granted the motion and consolidated the negligence case with the public disclosure case that was already pending. We now review both cases.

The issue on appeal is whether the information Guillen seeks is privileged from discovery by virtue of 23 U.S.C. § 409. To resolve that issue, we focus on 23 U.S.C. § 152 and 23 U.S.C. § 409. Hereafter, we refer to those provisions as Section 152 and Section 409.

Section 152 describes a funding program under which the federal government will pay much of the cost of improving hazardous public roads. Section 152 provides in part:

(a) Each state shall conduct and

> systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements ..., which may constitute a danger to motorists, bicyclists, and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.
>
> (b) The Secretary [of Transportation] may approve as a project under this section any safety improvement project.
>
> (c) ...
>
> (d) The Federal share payable on account of any project under this section shall be 90 percent of the cost thereof.[12]

One possible effect of Section 152 is to make it easier for injured persons to sue the state or its subdivisions. Section 152 requires a state to identify, and plan for the improvement of, "hazardous locations" on "all public roads."

---

[12] 23 U.S.C. § 152 (1990 & Supp. 1999).

To comply with it, a state and its subdivisions must collect and compile information. If a person injured on a public road is given access to that information, it will be easier than otherwise for him or her to prove a claim that the road was hazardous.

Section 409 is designed to neutralize this effect of Section 152. It provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules,

lists, or data.[13]

According to courts in other jurisdictions, Section 409's purpose is "to prohibit federally required record-keeping from being used as a 'tool ... in private litigation,'"[14] thereby facilitating "the free flow of safety-related information"[15] and "candor in administrative evaluations of highway safety hazards."[16]

---

[13] 23 U.S.C. § 409 (West Supp. 1999).

[14] *Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992)(quoting *Light v. State*, 560 N.Y.S.2d 962, 965, 149 Misc. 2d 75 (1990). *See also Harrison v. Burlington Northern R.R. Co.*, 965 F.2d 155 (7th Cir. 1992)).

[15] *Reichert v. Louisiana Dep't. Of Transp. And Dev.*, 694 So.2d 193, 197 (La. 1997); *Perkins v. Ohio Dep't. of Transp.*, 584 N.E.2d 794, 802, 65 Ohio. App. 3d 487 (1989).

[16] *Harrison*, 965 F.2d at 160; *Robertson*, 954 F.2d at 1435; *Taylor v. St. Louis Southwestern Ry. Co.*, 746 F.Supp. 50, 54 (D. Kan. 1990); *Weideman v. Dixie Elec.*
(continued...)

An injured claimant can be aided by reports or data *collected* pursuant to Section 152 as much as by reports or data *compiled* pursuant to Section 152. For that reason, as Pierce County correctly points out, Congress intended Section 409 to protect both information *collected* pursuant to Section 152, and information *compiled* pursuant to Section 152. As initially enacted in 1987, Section 409 provided that "reports ... or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites [or] ... hazardous roadway conditions ... pursuant to section[] ... 152

---

[16](...continued)
Membership Corp., 627 So.2d 170, 173 (La. 1993); *Duncan v. Union Pac. R.R. Co.*, 790 P.2d 595, 597 (Utah App. 1990), *aff'd*, 842 P.2d 832 (Utah 1992).

... shall not be admitted into evidence in [a] Federal or State court" proceeding ..."[17] As amended in 1995, Section 409 provides that "reports ... *compiled or collected* for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites [or] ... hazardous roadway conditions ... pursuant to section[] ... 152 ... shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding ..."[18] The purpose of the 1995 amendment was to clarify "that raw data compiled prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or

[17] 23 U.S.C. § 409 (1990).

[18] 23 U.S.C. § 409 (1999).

State court proceeding ..."[19]

To apply Section 409 properly, a court must distinguish between (a) the agency (e.g., a law enforcement agency) that collects or compiles information for purposes *unrelated* to Section 152, and (b) the agency (e.g., a public works department or road department) that collects and compiles information *pursuant* to Section 152. Section 409 does not protect reports or data collected by the former, because the former was not acting pursuant to Section 152. Section 409 does protect reports or data collected by the latter, *provided* that the latter was acting "for the purpose of identifying, evaluating, or planning the safety

[19] Act of November 18, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N. (109 Stat.) 591.

enhancement of ... hazardous roadway conditions ... pursuant to" Section 152.

An example illustrates. Suppose that a sheriff and his deputies investigate accidents and write reports. Each report is written for law enforcement purposes (e.g., to record why the author did or did not make an arrest or issue a citation). Each report is filed in the sheriff's office. Some time later, in the course of conducting an "engineering survey" of all public roads "for the purpose of identifying, evaluating, or planning the safety enhancement of ... hazardous roadway conditions ... pursuant to" section 152, the road department collects the sheriff's reports, analyzes the data they contain, and compiles the data in such a way as to demonstrate that certain public roads are hazardous.

Still later, a plaintiff wants to inspect or copy (1) the reports as held by the sheriff, (2) the reports as collected by the road department, and (3) the data compiled by the road department. Section 409 bars the second and third claims if the road department collected the reports and compiled the data "pursuant to" Section 152. Section 409 does not affect the first claim, because the sheriff did not collect or compile the reports "pursuant to" Section 152.

Pierce County argues that once the road department "collect" reports "pursuant to" Section 152, the public may no longer have access to them *in any form*. In other words, the County says, it does not matter whether a plaintiff seeks accident reports as they exist in the hands of the sheriff or accident re-

ports as collected by the road department; either way, the reports are nondiscoverable and nonadmissible under Section 409.

This argument contravenes the plain meaning of Section 409. As already seen, that section protects reports and data collected or compiled "for the purpose of identifying, evaluating, or planning the safety enhancement of ... hazardous roadway conditions ... pursuant to" Section 152. It does not protect reports collected for other purposes.

Additionally, the County's argument, if accepted, would extend Section 409 far beyond its purpose. As already seen, that purpose is to neutralize the litigation-aiding effect, if any, of Section 152 activity. It is *not* to exempt from discovery and admissibility

reports or data *unrelated* to Section 152 activity.

Finally, the County's argument, if accepted, would give the County carte blanche to render immune from discovery every accident report related to a public road within its territory, simply by having its road department "collect" the report. This result is absurd, and we seen no indication that Congress intended it.

Based on the foregoing analysis, we hold as follows:

(1) The trial court properly granted Guillen's request for disclosure of accident reports pertaining to the subject intersection. Guillen carefully requested reports in the hands of the sheriff or other law enforcement agencies, *not* reports or data "collected or

compiled" by the Public Works Department "pursuant to" Section 152.

(2) The trial court property granted Guillen's request for the diagrams prepared by Georgia Fischer. The County's declarations establish the Fischer was a "county employee" "responsible for investigating accidents;"[20] that her diagrams were "compiled and used specifically for the purpose of determining the need for and designing the signalization improvement that was the basis of the Section 152 application;"[21] and that her diagrams "were used to consider whether the design of the intersection was a causative factor in the accidents and what, if any, design improvements could

---

[20] Clerk's Papers at 54.

[21] Clerk's Papers at 54.

be made to increase safety and lessen the possibility of future accidents."[22] Curiously, however, the County's declarations are consistent with Fischer being a sheriff's deputy or other employee not generally engaged in Section 152 activity. They do not indicate the department Fischer worked in, her job title, or her job duties (except for investigating accidents). Nor do they indicate who used Fischer's diagrams for Section 152 purposes, or when Fischer's diagrams were used for Section 152 purposes. The County has the burden of showing that Fischer's diagrams were "collected or compiled" in the course of Section 152 activities,[23] and it has not met that

---

[22] Clerk's Papers at 54.

[23] RCW 42.17.340(1); *Southern Pac.*
(continued...)

burden here.

(3) The trial court erred by granting Guillen's request for the draft memo from Anderson to Gelman. Section 409 protects information derived from Section 152 activities,[24] and it seems more probable that not that the disputed memo contains such information.

(4) The trial court properly granted

---

[23](...continued)
Transp. Co. V. Yarnell, 181 Ariz. 316 890 P.2d 611, 613 (1995); *Dep't of Transp. v. Tate*, 47 Cal. App. 4th 85 856, 55 Cal. Rptr. 2d 2 (1996). *See Limstrom v. Ladenburg*, 136 Wn.2d 595, 612, 963 P.2d 869 (1998) (party asserting privilege must prove its applicability); *Dietz v. Doe*, 131 Wn.2d 835, 844, 935 P.2d 611 (1997)(same); *ACLU v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 975 P.2d 536 (1999)(same).

[24] *Lusby v. Union Pac. R.R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993); *Harrison*, 965 F.2d at 160 (court excludes oral testimony by author of highway safety report); *Robertson*, 954 F.2d at 1435 (same); *Yarnell*, 890 P.2d at 614.

Guillen's requests to disclose (a) the identity of all sheriff's deputies who patrolled the intersection; (b) accident photos; (c) witness statements; and (d) accident reports sent to the County from citizens involved in accidents at the intersection. None of these requests has anything whatever to do with Section 152 activities.

(5) The trial court property granted Guillen's requests to disclose the identity of all County employees with knowledge of accidents at the intersection, for that request does not call for the disclosure of information derived pursuant to Section 152. If Guillen later asks questions that an employee can answer only by relying on information compiled or collected pursuant to Section 152, the County may object on a

question-by-question basis, and the trial court will have to determine whether the employee can answer the question without relying on section 152 activities.[25]

(6) Given that Guillen is entitled to all but one of his requests, the trial court did not err by awarding reasonable attorney's fees pursuant to RCW 42.17.340(4).

We affirm both orders appealed from, except that the County shall not be required to disclose the memo from Anderson to Gelman. Guillen shall receive his costs and reasonable attorney's fees on appeal, provided that he complies with RAP 14.4 and 18.1.[26]

/s/
Morgan, P.J.

We concur:

/s/
Houghton, J.

/s/
Hunt, J.

---

[25] *See Lusby*, 4 F.3d at 641 (expert opinion based on independently generated data admissible); *Robertson*, 954 F.2d 1433. *See also Rodenbeck*, 982 F. Supp. 620, 625 (N.D. Ind. 1997); *Yarnell*, 890 P.2d at 614 (privilege does not extend to underlying facts).

[26] We have not considered the constitutionality of Section 409. It is arguable that Congress lacks the authority to dictate rules of discovery and rules of admissibility for use in *state* court. In particular, it is at least arguable that Congress lacks the authority to tell this state, or any state, that it "shall not" disclose or admit, in *state* court litigation, "reports ... or data compiled or collected" by a state agency (e.g., Pierce County's Public Works Department). Throughout this opinion, we have *assumed* that section 409 is constitutional, because neither party has raised or briefed that question.

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ROBERT and LuANN WHITMER, husband and wife, individually and as the guardians of SHANA WHITMER, an incapacitated person, HANNAH WHITMER, a minor, and DENEL WHITMER, an incapacitated person, Plaintiffs, vs. CHIN S. YUK and SUN YEONG YUK, husband and wife, and the marital community composed thereof; CHANG CHOI; the CITY OF LAKEWOOD, a municipal corporation; PIERCE COUNTY, a municipal corporation; and the CITY OF TACOMA, a municipal corporation, Defendants.	No. 97-2-07236-6 STIPULATION AND ORDER OF DISMISSAL AS TO ALL CLAIMS Judge: Katherine Stolz, Dept. 2 **(CLERK'S ACTION REQUIRED)**

COME NOW Richard H. Benedetti of Davies, Pearson, P.C., attorney of

record for plaintiffs Robert Whitmer, LuAnn Whitmer, Hannah Whitmer and Denel Whitmer; Keith L. Kessler of Stritmatter, Kessler, Whelan & Withey, attorney of record for plaintiff Shana Whitmer; Jeffrey F. Hale of Johnson, Graffe, Keay & Moniz, attorney of record for defendant City of Tacoma; Thomas J. West of Krilich, LaPorte, West & Lockner, attorney of record for defendant Pierce County; Vernon W. Harkins of Rush, Hannula, Harkins & Kyler, attorney of record for defendant City of Lakewood; and Timothy P. Malarchick of Malarchick & Associates, attorney of record for defendants Yuk and Choi; and hereby stipulate and agree that all claims, cross-claims, contribution claims, counter-claims and indemnity claims, by and between plaintiffs and defendants City of

Tacoma, Pierce County, City of Lakewood, Yuk, and Choi, may be dismissed with prejudice and without costs to any party for the reason that the said cause has been fully compromised and settled.

ORDER

THIS MATTER having come on duly and regularly before the undersigned Judge of the above-entitled court on the stipulation of the attorneys representing plaintiffs and defendants City of Tacoma, Pierce County, City of Lakewood, Yuk, and Choi, advising this court that all claims, cross-claims, contribution claims, counterclaims and indemnity claims, by and between said parties may be dismissed with prejudice and without costs to any party for the reason that said cause has been fully compromised and settled, and the court being fully

advised, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that all claims, cross-claims, contribution claims, counterclaims and indemnity claims, by and between plaintiffs and defendants City of Tacoma, Pierce County, City of Lakewood, Yuk, and Choi, be, and the same are hereby dismissed with prejudice and without costs to any party.

DONE IN OPEN COURT this 5th day of October, 2001.

/s/ Frederick B. Hayes
KATHERINE STOLZ, JUDGE

Presented By:
JOHNSON, GRAFFE, KEAY & MONIZ

/s/ Jeffrey F. Hale
Jeffrey F. Hale, WSBA #1800
Attorney for Defendant, City of Tacoma

Approved as to form and entry;
notice of presentation waived:

DAVIES, PEARSON, P.C.

/s/ Richard H. Benedetti
Richard H. Benedetti, WSBA #6330
Attorney for Plaintiffs, Robert Whitmer, LuAnn Whitmer, Shana Whitmer, Hannah Whitmer, Denel Whitmer

STRITMATTER, KESSLER, WHELAN, & WHITHEY

/s/ Keith L. Kessler
Keith L. Kessler, WSBA #4720
Attorney for Plaintiff, Shana Whitmer

MALARCHICK & ASSOCIATES

/s/ Richard Benedetti per phone auth by
Timothy P. Malarchick, WSBA #
Attorney for Defendants Yuk & Choi

KRILICH, LaPORTE, WEST & LOCKNER

/s/ Thomas J. West
Thomas J. West, WSBA #
Attorney for Defendant Pierce County

RUSH, HANNULA, HARKINS & KYLER

/s/ Harold T. Dodge, Jr.

Vernon W. Harkins, WSBA #
Harold T. Dodge, Jr., WSBA #15191
Attorneys for Defendant City of Lakewood

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution, Article I, § 8, clause 1

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

2. United States Constitution, Article I, § 8, clause 3

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

3. United States Constitution, Article I, § 8, clause 18

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

4. U.S. Constitution, Article VI, clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

5. U.S. Constitution, Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

6. 23 U.S.C. § 152

(a) In general.--

(1) Program.--Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists, bicyclists, and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

(2) Hazards.--In carrying out paragraph (1), a State may, at its discretion--

(A) identify, through a survey, hazards to motorists, bicyclists, pedestrians, and users of highway facilities; and

(B) develop and implement projects and programs to address the hazards.

(b) The Secretary may approve as a project under this section any safety improvement project, including a project described in subsection (a).

(c) Funds authorized to carry out this section shall be available for expenditure on--

(1) any public road;

(2) any public surface transportation facility or any publicly owned bicycle or pedestrian pathway or trail; or

(3) any traffic calming measure.

(d) The Federal share payable on account of any project under this section shall be 90 percent of the cost thereof.
(e) Funds authorized to be appropriated to carry out this section shall be available for obligation in the same manner and to the same extent as if such funds were apportioned under section 104(b), except that the Secretary is authorized to waive provisions he deems inconsistent with the purposes of this section.
(f) Each State shall establish an evaluation process approved by the Secretary, to analyze and assess results achieved by safety improvement projects carried out in accordance with procedures and criteria established by this section. Such evaluation process shall develop cost-benefit data for various types of corrections and treatments which shall be used in setting priorities for safety improvement projects.
(g) Each State shall report to the Secretary of Transportation not later than December 30 of each year, on the progress being made to implement safety improvement projects for hazard elimination and the effectiveness of such improvements. Each State report shall contain an assessment of the cost of, and safety benefits derived from, the various means and methods used to mitigate or eliminate hazards and the previous and subsequent accident experience at these locations. The Secretary of Transportation shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives not later than April 1 of each year on the progress being made by the States in implementing the hazard elimination program (including but not limited to any projects for pavement marking). The report shall include, but not be limited

to, the number of projects undertaken, their distribution by cost range, road system, means and methods used, and the previous and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (a) and include recommendations for future implementation of the hazard elimination program.
(h) For the purposes of this section the term "State" shall have the meaning given it in section 401 of this title.

7. 23 U.S.C. § 402

(a) Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform guidelines promulgated by the Secretary. Such uniform guidelines shall be expressed in terms of performance criteria. In addition, such uniform guidelines shall include programs (1) to reduce injuries and deaths resulting from motor vehicles being driven in excess of posted speed limits, (2) to encourage the proper use of occupant protection devices (including the use of safety belts and child restraint systems) by occupants of motor vehicles and to increase public awareness of the benefit of motor vehicles equipped with airbags, (3) to reduce deaths and injuries resulting from persons driving motor vehicles while impaired by alcohol or a controlled substance, (4) to prevent accidents and reduce deaths and injuries resulting from accidents involving motor vehicles and motorcycles, (5) to reduce injuries and deaths resulting from accidents involving school buses, and (6) to improve law en-

forcement services in motor vehicle accident prevention, traffic supervision, and post-accident procedures. The Secretary shall establish a highway safety program for the collection and reporting of data on traffic-related deaths and injuries by the States. Under such program, the States shall collect and report such data as the Secretary may require. The purposes of the program are to ensure national uniform data on such deaths and injuries and to allow the Secretary to make determinations for use in developing programs to reduce such deaths and injuries and making recommendations to Congress concerning legislation necessary to implement such programs. The program shall provide for annual reports to the Secretary on the efforts being made by the States in reducing deaths and injuries occurring at highway construction sites and the effectiveness and results of such efforts. The Secretary shall establish minimum reporting criteria for the program. Such criteria shall include, but not be limited to, criteria on deaths and injuries resulting from police pursuits, school bus accidents, and speeding, on traffic-related deaths and injuries at highway construction sites and on the configuration of commercial motor vehicles involved in motor vehicle accidents. Such uniform guidelines shall be promulgated by the Secretary so as to improve driver performance (including, but not limited to, driver education, driver testing to determine proficiency to operate motor vehicles, driver examinations (both physical and mental) and driver licensing) and to improve pedestrian performance and bicycle safety. In addition such uniform guidelines shall include, but not be limited to, provisions for an effective record system of accidents (including injuries and deaths resulting therefrom), accident investigations to determine the probable causes of accidents, injuries, and deaths, vehicle registration, operation, and inspection, highway design and maintenance (including lighting, markings, and surface treatment), traffic control, vehicle codes and laws, surveillance of

traffic for detection and correction of high or potentially high accident locations, enforcement of light transmission standards of window glazing for passenger motor vehicles and light trucks as necessary to improve highway safety, and emergency services. Such guidelines as are applicable to State highway safety programs shall, to the extent determined appropriate by the Secretary, be applicable to federally administered areas where a Federal department or agency controls the highways or supervises traffic operations.

(b) Administration of State programs.--

(1) Administrative requ'rements.--The Secretary may not approve a State highway safety program under this section which does not--

(A) provide that the Governor of the State shall be responsible for the administration of the program through a State highway safety agency which shall have adequate powers and be suitably equipped and organized to carry out, to the satisfaction of the Secretary, such program;

(B) authorize political subdivisions of the State to carry out local highway safety programs within their jurisdictions as a part of the State highway safety program if such local highway safety programs are approved by the Governor and are in accordance with the minimum standards established by the Secretary under this section;

(C) except as provided in paragraph (3), provide that at least 40 percent of all Federal funds apportioned under this section to the State for any fiscal year will be expended by the political subdivisions of the State, including Indian tribal governments, in carrying out local highway safety programs authorized in accordance with subparagraph (B); and

(D) provide adequate and reasonable access for the safe and convenient movement of individuals with disabilities, including those in wheelchairs, across curbs constructed or replaced on or after July 1, 1976, at all pedestrian crosswalks throughout the State.

(2) Waiver.--The Secretary may waive the requirement of paragraph (1)(C), in whole or in part, for a fiscal year for any State whenever the Secretary determines that there is an insufficient number of local highway safety programs to justify the expenditure in the State of such percentage of Federal funds during the fiscal year.

(3) Use of technology for traffic enforcement.--The Secretary may encourage States to use technologically advanced traffic enforcement devices (including the use of automatic speed detection devices such as photo-radar) by law enforcement officers.

[(4), (5) Redesignated (2), (3)]

(c) Funds authorized to be appropriated to carry out this section shall be used to aid the States to conduct the highway safety programs approved in accordance with subsection (a), including development and implementation of manpower training programs, and of demonstration programs that the Secretary determines will contribute directly to the reduction of accidents, and deaths and injuries resulting therefrom. Such funds shall be subject to a deduction not to exceed 5 per centum for the necessary costs of administering the provisions of this section, and the remainder shall be apportioned among the several States. Such funds shall be apportioned 75 per centum in the ratio which the population of each State bears to the total population of all the States, as shown by the latest available Federal census, and 25 per centum in the ratio which the public road mileage in each State bears to the total public road mileage in all States. For the purposes of this subsection, a "public road" means any road under the jurisdiction of and maintained by a public authority and open to public travel. Public road mileage as used in this subsection shall be determined as of the end of the calendar year preceding the year in which the funds are apportioned and shall be certified to by the Governor of the State and subject to approval by the Secretary.

The annual apportionment to each State shall not be less than one-half of 1 per centum of the total apportionment, except that the apportionment to the Secretary of the Interior shall not be less than three-fourths of 1 percent of the total apportionment and the apportionments to the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands shall not be less than one-quarter of 1 per centum of the total apportionment. The Secretary shall not apportion any funds under this subsection to any State which is not implementing a highway safety program approved by the Secretary in accordance with this section. For the purpose of the seventh sentence of this subsection, a highway safety program approved by the Secretary shall not include any requirement that a State implement such a program by adopting or enforcing any law, rule, or regulation based on a guideline promulgated by the Secretary under this section requiring any motorcycle operator eighteen years of age or older or passenger eighteen years of age or older to wear a safety helmet when operating or riding a motorcycle on the streets and highways of that State. Implementation of a highway safety program under this section shall not be construed to require the Secretary to require compliance with every uniform guideline, or with every element of every uniform guideline, in every State. Funds apportioned under this section to any State, that does not have a highway safety program approved by the Secretary or that is not implementing an approved program, shall be reduced by amounts equal to not less than 50 per centum of the amounts that would otherwise be apportioned to the State under this section, until such time as the Secretary approves such program or determines that the State is implementing an approved program, as appropriate. The Secretary shall consider the gravity of the State's failure to have or implement an approved program in determining the amount of the reduction. The Secretary shall promptly apportion to the State the funds withheld

from its apportionment if he approves the State's highway safety program or determines that the State has begun implementing an approved program, as appropriate, prior to the end of the fiscal year for which the funds were withheld. If the Secretary determines that the State did not correct its failure within such period, the Secretary shall reapportion the withheld funds to the other States in accordance with the formula specified in this subsection not later than 30 days after such determination.

(d) All provisions of chapter 1 of this title that are applicable to National Highway System highway funds other than provisions relating to the apportionment formula and provisions limiting the expenditure of such funds to the Federal-aid systems, shall apply to the highway safety funds authorized to be appropriated to carry out this section, except as determined by the Secretary to be inconsistent with this section, and except that the aggregate of all expenditures made during any fiscal year by a State and its political subdivisions (exclusive of Federal funds) for carrying out the State highway safety program (other than planning and administration) shall be available for the purpose of crediting such State during such fiscal year for the non-Federal share of the cost of any project under this section (other than one for planning or administration) without regard to whether such expenditures were actually made in connection with such project and except that, in the case of a local highway safety program carried out by an Indian tribe, if the Secretary is satisfied that an Indian tribe does not have sufficient funds available to meet the non-Federal share of the cost of such program, he may increase the Federal share of the cost thereof payable under this Act to the extent necessary. In applying such provisions of chapter 1 in carrying out this section the term "State transportation department" as used in such provisions shall mean the Governor of a State for the purposes of this section.

(e) Uniform guidelines promulgated by the Secretary to carry out this section shall be developed in cooperation with the States, their political subdivisions, appropriate Federal departments and agencies, and such other public and private organizations as the Secretary deems appropriate.

(f) The Secretary may make arrangements with other Federal departments and agencies for assistance in the preparation of uniform guidelines for the highway safety programs contemplated by subsection (a) and in the administration of such programs. Such departments and agencies are directed to cooperate in such preparation and administration, on a reimbursable basis.

(g) Nothing in this section authorizes the appropriation or expenditure of funds for (1) highway construction, maintenance, or design (other than design of safety features of highways to be incorporated into guidelines) or (2) any purpose for which funds are authorized by section 403 of this title.

[(h) Repealed. Pub. L. 97-35, Title XI, § 1107(c), Aug. 13, 1981, 95 Stat. 626]

(i) Application in Indian country.--

(1) Use of terms.--For the purpose of application of this section in Indian country, the terms "State" and "Governor of a State" include the Secretary of the Interior and the term "political subdivision of a State" includes an Indian tribe.

(2) Expenditures for local highway programs.--Notwithstanding subsection (b)(1)(C), 95 percent of the funds apportioned to the Secretary of the Interior under this section shall be expended by Indian tribes to carry out highway safety programs within their jurisdictions.

(3) Access for individuals with disabilities.--The requirements of subsection (b)(1)(D) shall be applicable to Indian tribes, except to those tribes with respect to which the Secretary determines that application of such provisions

would not be practicable.

(4) Indian country defined.--In this subsection, the term "Indian country" means--

(A) all land within the limits of any Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of any patent and including rights-of-way running through the reservation;

(B) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof and whether within or without the limits of a State; and

(C) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through such allotments.

(j) Rulemaking proceeding.--The Secretary may periodically conduct a rulemaking process to identify highway safety programs that are highly effective in reducing motor vehicle crashes, injuries, and deaths. Any such rulemaking shall take into account the major role of the States in implementing such programs. When a rule promulgated in accordance with this section takes effect, States shall consider these highly effective programs when developing their highway safety programs.

(k)(1) Subject to the provisions of this subsection, the Secretary shall make a grant to any State which includes, as part of its highway safety program under section 402 of this title, the use of a comprehensive computerized safety record keeping system designed to correlate data regarding traffic accidents, drivers, motor vehicles, and roadways. Any such grant may only be used by such State to establish and maintain a comprehensive computerized traffic safety record keeping system or to obtain and operate components to support highway safety priority programs identified by the Secretary under this section. Notwithstanding any other provision of law, if a report, list, schedule, or survey is prepared

by or for a State or political subdivision thereof under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey.

(2) No State may receive a grant under this subsection in more than two fiscal years.

(3) The amount of the grant to any State under this subsection for the first fiscal year such State is eligible for a grant under this subsection shall equal 10 per centum of the amount apportioned to such State for fiscal year 1985 under this section. The amount of a grant to any State under this subsection for the second fiscal year such State is eligible for a grant under this subsection shall equal 10 per centum of the amount apportioned to such State for fiscal year 1986 under this section.

(4) A State is eligible for a grant under this subsection if--

(A) it certifies to the Secretary that it has in operation a computerized traffic safety recordkeeping system and identifies proposed means of upgrading the system acceptable to the Secretary; or

(B) it provides to the Secretary a plan acceptable to the Secretary for establishing and maintaining a computerized traffic safety recordkeeping system.

(5) The Secretary, after making the deduction authorized by the second sentence of subsection (c) of this section for fiscal years 1985 and 1986, shall set aside 10 per centum of the remaining funds authorized to be appropriated to carry out this section for the purpose of making grants under this subsection. Funds set aside under this subsection shall remain available for the fiscal year authorized and for the succeeding fiscal year and any amounts remaining unexpended at the end of such period shall be apportioned in accordance with the provisions of subsection (c) of this section.

8. 23 U.S.C. § 409

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

9. RCW 47.04.050

The state of Washington hereby assents to the purposes, provisions, terms and conditions of the grant of money provided in an act of congress entitled: "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," approved July 11, 1916, and all acts, grants and appropriations amendatory and supplementary thereto and affecting the state of Washington.

10. RCW 47.04.060

The department is authorized and directed to act for and on behalf of the state of Washington, and any political subdivision of the state, in all things pertaining to the selection, construction, and maintenance of highways and roads

under the provisions of the act of congress approved July 11, 1916, and any and all acts amendatory thereto; and to enter into such agreement with the secretary of transportation or other duly authorized agent of the United States as may from time to time be desirable or necessary to secure the money or aid for any section of state highway, county road, or city or town street selected by law for construction or improvement through an appropriation for the period in which the construction or improvement is to be made. The money shall be added to and expended in connection with the appropriation aforesaid; and shall apply thereto, as may be required, cooperative expenditures from the motor vehicle fund, which may have been appropriated by the state legislature, and from any highway, road, or street fund of any political subdivision, and which are available for the construction and maintenance of any section of state highway, county road, or city or town street selected as aforesaid for such aid and improvement.

11. RCW 47.04.070

In all matters relating to the cooperative construction or improvement of any state highway, county road, or city or town street for which federal funds or aid is secured under any act of congress, the department shall act in the manner provided by state law relating to state highway construction from the motor vehicle fund, so far as the same may be consistent with the provisions of such act of congress and the rules and regulations made by the secretary of transportation or other authorized agent of the United States government pursuant to such act, to which the procedure shall be adapted by the department as may be necessary.

No. 01-1229

Supreme Court, U.S.
FILED
MAR 27 2002
CLERK

In The

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, *et al.*,

Respondents.

PIERCE COUNTY,

Petitioner,

v.

ROBERT AND LUANN WHITMER, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF OF RESPONDENTS WHITMER IN OPPOSITION TO WRIT OF CERTIORARI

KEITH L. KESSLER
GARTH L. JONES
STRITMATTER KESSLER WHELAN WITNEY
413 – 8th Street
Hoquiam, WA 98550
(360) 533-2710

*CHARLES K. WIGGINS
KENNETH W. MASTERS
WIGGINS LAW OFFICES, P.L.L.C.
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

RICHARD H. BENEDETTI
DAVIES PEARSON, P.C.
920 Fawcett – P.O. Box 1657
Tacoma, WA 98401
(253) 572-3052

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Did the Washington Supreme Court correctly hold that Congress had power under the Spending, Commerce and Necessary and Proper Clauses to prohibit the discovery and admission into evidence of documents "compiled" for and submitted with applications to obtain federal highway funds, but lacked the power to prohibit the discovery and admission into evidence of documents "collected" for possible use in applications for federal highway funds if those documents were originally prepared for routine state and local purposes?

2. Can a private plaintiff assert the unconstitutionality of a federal statute to defeat a public defendant's reliance on the federal statute as a bar to the discovery and admission of evidence in a state court litigation?

PARTIES TO PROCEEDING

The Washington State Supreme Court decision from which Pierce County petitions for certiorari is a consolidation of two separate cases, ***Guillen v. Pierce County***, Washington Supreme Court No. 68535-5, and ***Whitmer v. Yuk***, Washington Supreme Court No. 69327-7. This brief is filed by plaintiffs Whitmer.

The parties to ***Guillen v. Pierce County*** were:

1. Pierce County, a municipal corporation, defendant;
2. Ignacio Guillen as legal guardian for Jennifer and Alma Guillen, plaintiff;
3. Mariano Guillen as legal guardian for Paulina and Fatima Guillen, plaintiff;
4. The Estate of Clementina Guillen-Alejandre, defendant.

The parties in ***Whitmer v. Yuk*** were:

5. Robert and LuAnn Whitmer, individually and as guardians of Shana, Hanna and Denel Whitmer, plaintiffs;
6. Pierce County, a municipal corporation, defendant;
7. Chin S. and "Jane Doe" Yuk, defendants;
8. Chang and "Jane Doe" Choi, defendants;
9. City of Lakewood, a municipal corporation, defendant;

PARTIES TO PROCEEDING – Continued

10. City of Tacoma, a municipal corporation, defendant.

As noted in the Petition, the Whitmers have settled with Pierce County. App. I. Despite the settlement, the Whitmers remain interested in the outcome of this proceeding pursuant to Supreme Court Rule 12.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

ARGUMENT 6

A. This Court Probably Lacks Jurisdiction Because *Guillen* Is Not Final Or Ripe, And *Whitmer* Has Settled 6

B. The Court Should Decline To Exercise Its Certiorari Jurisdiction Over This First Decision By Any Court To Consider The Constitutionality Of The 1995 Amendment To Section 409, And This First Decision Analyzing Section 409 In Light Of This Court's Analyses In *Lopez* and *Morrison* 11

C. The County's Supremacy Clause Argument Is Tautological In That A Federal Statute Is Only The Supreme Law Of The Land If It Is Made Pursuant To Powers Delegated To Congress By The Constitution 13

TABLE OF CONTENTS - Continued

Page

D. The 1995 Amendment Is Not Authorized By The Spending Clause Because: The Federal Interest In Safe Roads Is Not Sufficiently Related To A Prohibition On Discovery/Admission Of Data And Documents Originally Prepared For Routine State And Local Purposes; And Congress Never Gave The States The Choice Of Accepting Or Rejecting § 409, But Imposed § 409 "Notwithstanding Any Other Provision Of Law." 15

E. The 1995 Amendment Is Not Authorized By The Commerce Clause Because The Discovery/Admission Of Data And Documents Originally Prepared For Routine State And Local Purposes Does Not Substantially Affect Interstate Commerce Under *Lopez* And *Morrison* 20

F. The Necessary And Proper Clause Does Not Authorize The 1995 Amendment To Section 409 25

G. Petitioner's 10th Amendment Red Herring Ignores The Only Standing Analysis Applicable Here, But Plaintiffs Suffered A Personal Injury Caused By The 1995 Amendment And Redressable In State Court In Any Event 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989) 26

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 9

Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227 (1937) 10

Allen v. Wright, 468 U.S. 737 (1984) 25, 27

Catlin v. United States, 324 U.S. 229 (1945) 7

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 7, 8

Dakota Cy. v. Glidden, 113 U.S. 222 (1885) 10

Erie v. Pap's A.M., 529 U.S. 277 (2000) 10

Flast v. Cohen, 392 U.S. 83 (1968) 26

Frothingham v. Mellon, 262 U.S. 447 (1928) 27

Fullilove v. Klutznick, 448 U.S. 448 (1980) 18

Gregory v. Ashcroft, 501 U.S. 452 (1991) 14

Hodel v. Indiana, 452 U.S. 314 (1981) 24

Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958) 16

Jefferson v. City of Tarant, 522 U.S. 75 (1997) 7

Massachusetts v. United States, 435 U.S. 444 (1978) 16

Mountain States Legal Fnd. v. Costle, 630 F.2d 754 (10th Cir.), *cert. denied*, 450 U.S. 1050 (1980) 29

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 8

South Dakota v. Dole, 483 U.S. 203 (1987) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Tennessee Electric Power Co. v. Tennessee Valley Auth., 306 U.S. 118 (1939) 28, 29

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) 10

United States v. Lopez, 514 U.S. 549 (1995) ..... *passim*

United States v. Morrison, 529 U.S. 598 (2000) ..... *passim*

Vermont Assembly of Home Health Agencies, Inc. v. Shalala, 18 F. Supp. 2d 355 (D. Vt. 1988) 29

STATE CASES

Diversified Investment v. DSHS, 775 P.2d 947 (Wash. 1989) 20

Berglund v. Spokane County, 103 P.2d 355 (Wash. 1940) 4

Guillen v. Pierce County, 144 Wn.2d 696, 31 P.3d 628 (2001) ..... *passim*

Martinolich v. Southern Pac. Transp., 532 So.2d 435 (La. App.), *cert. denied*, 490 U.S. 745 (1988) 12, 19

Palacios v. Louisiana and Delta RR, 775 So.2d 698 (La. App. 2000) 12

S. Pac. Transp. Co. v. Yarnell, 890 P.2d 611 (Ariz. 1995) 24

Sawyer v. Ill. Cent. Gulf RR Co., 606 So.2d 1069 (Miss. 1992) 19

Spokane Police Guild v. Liquor Control Bd., 769 P.2d 283 (Wash. 1989) 13

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 8, cl. 3 ..... *passim*

U.S. CONST. art. I, § 8, cl. 18 ..... 21, 25

U.S. CONST. art. I, § 8, cl. 1 ..... *passim*

U.S. CONST. art. VI, cl. 2 14

U.S. CONST. amend. X 27, 29

U.S. CONST. amend. XIV 2

STATUTES

18 U.S.C. § 922(q)(1)(A) 27

23 U.S.C. § 130 7

23 U.S.C. § 144 7

23 U.S.C. § 152 ..... *passim*

23 U.S.C. § 152(a)(1) 19

23 U.S.C. § 158 ..... 15, 19

23 U.S.C. § 409 ..... *passim*

28 U.S.C. § 1257 ..... 1, 2, 26

42 U.S.C. § 13981 27

1917 Wash. Laws, Ch. 76 §§ 1, 5 20

1961 Wash. Laws, Ch. 13 20

1984 Wash. Laws, Ch. 7 §§ 86, 87 20

TABLE OF AUTHORITIES – Continued

Page

Wash. Rev. Code § 42.17.340(4) 9

Wash. Rev. Code § 47.04.050 20

MISCELLANEOUS

Erwin Chemerinsky, FEDERAL JURISDICTION (3rd Ed. 1999) 8, 9, 10

RULES

Supreme Court Rule 12.6 iii

Supreme Court Rule 10 11

Supreme Court Rule 10(b) 11

Supreme Court Rule 10(c) 11

Washington Rule of Appellate Procedure 2.3 7

OPINIONS BELOW

The Opinion of the Supreme Court of Washington is reported at 144 Wn.2d 696, 31 P.3d 628 (2001), and is reproduced at Petition Appendix ("App.") A. The Order of the Supreme Court of the State of Washington modifying the Opinion and denying further reconsideration is unreported, and is reproduced at App. B. (The changes on reconsideration are not reflected in the copy of the Opinion included as App. A.) The Opinion of the Washington State Court of Appeals in *Guillen* is reported at 96 Wn. App. 862, 982 P.2d 123 (1999), and is reproduced at App. H.

There is no Court of Appeals decision in *Whitmer v. Yuk*. The Supreme Court accepted direct review of the order of the Superior Court.

JURISDICTION

This Court probably lacks jurisdiction because the decision of the Washington Supreme Court is not a "final judgment or decree" under 28 U.S.C. § 1257. That decision vacated and remanded the *Guillen* case for further evidentiary rulings, so *Guillen* is neither final nor ripe. The *Whitmer* case has settled. This Court should either deny review or accept both cases, as discussed *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The jurisdictional issue arises under 28 U.S.C. § 1257, which provides in relevant part that this Court has jurisdiction to review by certiorari "final judgments or decrees rendered by the highest court of a State in which a decision could be had." Petitioner Pierce County has included the remaining constitutional and statutory provisions in its Appendix J.

STATEMENT OF THE CASE

Petitioner Pierce County correctly notes that the Washington State Court of Appeals declined to address the constitutionality of 23 U.S.C. § 409 because neither the County nor respondent Guillen raised or briefed the issue. Petition at 4. By contrast, the Whitmers challenged the constitutionality of the County's interpretation of § 409 in their motion for an order compelling discovery. The Whitmers argued that denying access to public documents regarding traffic data would violate their 14th Amendment right to due process (U.S. CONST. amend. XIV, § 1) and that such an expansive interpretation of § 409 would exceed the powers delegated to Congress. Clerk's Papers ("CP") 61-64, 242-44. Accordingly, when the State Supreme Court granted direct review in the *Whitmer* case and consolidated *Whitmer* with *Guillen*, the Court also requested that all parties brief the constitutionality of § 409. 31 P.3d at 637, App. A 21.

On August 8, 1996, respondent Denel Whitmer was driving a Volkswagen south on Custer Road in the City of Lakewood, Washington. 31 P.3d at 635. Seventy-fifth

Street intersects with Custer Road, and stop signs require east-west traffic on 75th Street to stop at Custer Road. *Id.* Defendant Chin Yuk, who was traveling east on 75th Street, proceeded into the intersection and struck the right rear of Whitmer's Volkswagen. CP 465-485. The impact spun the Volkswagen around to crash into a utility pole south of the intersection. *Id.* Danel Whitmer and her sister Shana, who was also riding in the car, sustained severe and disabling injuries. CP 541.

The Whitmers' expert civil highway engineer reviewed public traffic accident history records for the intersection, as well as an hourly traffic volume study done by Pierce County. CP 896. The engineer concluded that the intersection violated applicable traffic engineering standards and was not reasonably safe for public travel. CP 896.

The Whitmers brought this action against defendant Yuk for negligently driving his vehicle, defendant Choi, the owner of the vehicle, and defendant City of Lakewood, for failure to adequately repair, maintain, design, sign and adequately control the intersection so that it would not create an unnecessary or unreasonable hazard to motorists. CP 539-40. The area of the intersection had recently been annexed to the City of Lakewood, previously having been a part of unincorporated Pierce County. CP 17. Accordingly, the Whitmers also named Petitioner County as a defendant for failure to adequately construct, repair, maintain, design, sign and control the intersection, and to adequately disclose to defendant Lakewood the unsafe condition of the roadway. CP 540-41.

It has long been the law in Washington State that a county must "exercise ordinary care to keep its public ways in a reasonably safe condition for persons using such ways in a proper manner and exercising due care for their own safety," a rule the Washington Supreme Court has characterized as "well-nigh universal in this country." *Berglund v. Spokane County*, 103 P.2d 355, 358 (Wash. 1940). But the County's duty is limited to protecting against such dangers to the traveling public " 'as may reasonably be anticipated, having due regard to the character of travel, the incidental purposes for which the highway may be lawfully used, and the nature of the possible danger at the point in question.' " 103 P.2d at 359 (quoting 8 Am. Jur. 936, § 38). In order to show that the County failed to exercise reasonable care or should have anticipated the hazard leading to the Whitmers' injury, the Whitmers were required to prove that the County knew or should have known of the particular hazards.

The Whitmers promulgated discovery to determine the knowledge of the County and the City of hazardous conditions at the intersection. The Whitmers asked for motor vehicle traffic accident records and reports by location, documentation relating to any studies in the vicinity of the intersection, hourly traffic counts, evaluations of the accident history at the intersection, information regarding collisions, the speed of vehicles, the need for traffic control devices, and general traffic operations at the intersection. CP 68, 83-84. The County and the City declined to produce any of this information, relying on 23 U.S.C. § 409. CP 71-72, 116-19, 135-42. The Whitmers eventually learned that the County had accident reports for over 50 accidents in the five years before the

Whitmers' collision, 17 vehicle volume summaries, responses to citizen complaint letters, a private traffic impact analysis prepared for a Chevron station, a private traffic impact analysis prepared for a McDonald's restaurant, and other documents. CP 709-10.

The Whitmers moved to compel discovery responses from both the City and the County. CP 36. The City responded that Custer Road is a principal arterial, and therefore a federal aid route eligible for participation in the 23 U.S.C. § 152 "hazard elimination program." CP 11. But the City admitted that it did not apply for federal funding for this intersection, but instead planned, scheduled and funded a reconstruction and realignment of the intersection, including installation of a traffic signal, using state funds rather than federal funds. CP 11-12. The City claimed that it would have used the withheld data if it had chosen to apply for federal funding for the intersection and that it "keeps this data on hand for the purpose of supporting applications for federal-aid highway funds for its Federal Aid Routes among other purposes." CP 12. The County similarly claimed that it collected this information so that it could have applied for federal highway funds if appropriate. CP 17-18.

The trial court initially denied the Whitmers' Motion to Compel Discovery, concluding that § 409 barred discovery. CP 337-38. But after the Washington State Court of Appeals ordered discovery in the *Guillen* case, the Whitmers renewed their motion for discovery. CP 860. The trial court granted the motion and ordered discovery of several documents, which are listed at 31 P.2d at 636-37, App. A 18-20.

In contrast to the Whitmers' expansive document requests, the Guillens limited their document request to avoid the restrictions of § 409. The Guillens' counsel advised the County that, "we are not seeking any reports that were specifically written for developing any safety construction improvement project at the intersection at issue." 31 P.3d at 633, App. A 7. The County eventually identified 20 different documents responsive to the Guillens' request, initially refusing to disclose any of the documents. Guillen CP 112-13.[1] The County subsequently partially withdrew its objection, producing four of the documents – complaints by citizens and a Pierce County Council member requesting corrective measures at the intersection. Guillen CP 139-45. The Guillens then withdrew their request for eleven of the documents. Guillen CP 76. The trial court ordered the County to produce the remaining five documents (including the collection of motor vehicle traffic accident reports prepared by the State Patrol). 31 P.3d at 634, App. A 9-10.

ARGUMENT

A. This Court Probably Lacks Jurisdiction Because *Guillen* Is Not Final Or Ripe, And *Whitmer* Has Settled.

A decision is final when it "ends the litigation on the merits and leaves nothing for the court to do but execute

[1] Document No. 13 is actually a collection of "police traffic collision reports and motor vehicle reports from 1/1/90 prepared by law enforcement agencies." Guillen CP 113.

the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). This occurs only if the decision determines the action (*i.e.*, is not interlocutory) and is not subject to further review by a state tribunal. *Jefferson v. City of Tarant*, 522 U.S. 75 (1997). Exceptions exist (*see Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)), but none of them apply here.

Both *Guillen* and *Whitmer* came to the Washington Supreme Court on discretionary review of an interlocutory discovery order. App. A 14 (*Guillen*); App. A 21 (*Whitmer*). *See generally* Washington Rule of Appellate Procedure 2.3. The Washington Supreme Court did not hold that the County must produce any documents. Instead, the court held that the record was inadequate to make this determination, and remanded to the superior court for further proceedings:

> [O]nly publicly held materials and data that were originally *created* for the identification, evaluation, planning, or development of federally funded safety enhancement projects under 23 U.S.C. §§ 130, 144, or 152 are lawfully privileged under 23 U.S.C. § 409. . . . Because the record contains insufficient facts to apply this standard to all of the disputed items, we vacate the lower courts' rulings and remand for supplementation of the record and further proceedings not inconsistent with this opinion.

31 P.3d at 656, App. A 113-14 (italics in original).

Like the appellant in *Jefferson v. City of Tarant*, Pierce County seeks to bring this case to this Court "too soon" because the decision is "avowedly interlocutory." 522 U.S. at 77, 81. This decision is not "final" in any sense.

Nor does the *Guillen* decision come within any of the limited exceptions to the finality requirement noted in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975): (1) that the federal issue is conclusive, regardless of further state court proceedings; (2) that the federal issue merits review and will survive further state court proceedings; (3) that the federal issue merits review, but will not survive further state court proceedings and will otherwise evade review; and (4) that the federal issue merits review and was finally determined by the state court, further proceedings may resolve the case on independent and adequate state law grounds, this Court's ruling on the federal issue might end the litigation, and important federal interests are at stake. 420 U.S. at 479-83; *see also* Erwin Chemerinsky, FEDERAL JURISDICTION § 10.4 (3rd Ed. 1999). These exceptions generally apply only where the future state proceedings do not involve a further decision of the federal question:

> In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and delayed justice.'

420 U.S. at 477-78 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

None of the *Cox* exceptions applies in *Guillen*. The first and fourth exceptions cannot apply because the federal issue concerning document discovery is not (and cannot be) conclusive of the entire case. The second and third exceptions cannot apply because it is not possible to

know whether the federal issue will survive. The federal issue could become moot if the Superior Court concludes that all of the documents are protected by § 409 even under the decision of the Washington Supreme Court. It could also become moot if the superior court concludes that none of the documents are protected from disclosure under the broadest possible interpretation of § 409 even if the entire statute is constitutional. But the federal issue also might survive.

Petitioner argues that the Washington Supreme Court decision is final based on one sentence dealing with attorney's fees on the Guillens' state law claim. Petition at 6 n.1. The Supreme Court stated, "Lastly, we agree with the Court of Appeals that Guillen is entitled to attorney fees under [Wash. Rev. Code §] 42.17.340(4), since the record suggests that he was entitled to at least four of the five items to which he was denied access in his [Public Disclosure Act] case." 31 P.3d at 655-56, App. A 113. The Court's observation that the record "suggests" that Guillen is entitled to the documents is not a final holding or an order that Pierce County must disclose the documents. Rather, the operative language of the Washington Court's decision is that the lower courts' rulings are vacated and the case remanded "for supplementation of the record and further proceedings not inconsistent with this opinion." *Id.*

The speculative nature of further proceedings regarding the federal issue also raises other justiciability concerns. When, as here, an alleged injury is speculative and may never occur, the issue is not ripe. *See, e.g., Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967); FEDERAL JURISDICTION, *supra*, § 2.4. As the Washington Supreme Court

noted, "the record contains insufficient facts to apply this [federal statutory] standard to all of the disputed items. . . . " As noted above, the federal issue may never arise on remand. *Guillen* is not ripe. 31 P.3d at 656.

Justiciability concerns also arise in *Whitmer*. *Whitmer* is final because it has settled. Normally a settlement renders a case moot. *See, e.g., United Airlines, Inc. v. McDonald*, 432 U.S. 385, 400 (1977) (Powell, J., dissenting); *Dakota Cy. v. Glidden*, 113 U.S. 222 (1885); *but see Erie v. Pap's A.M.*, 529 U.S. 277, 287-88 (2000) (parties cannot manipulate the Court's jurisdiction to insulate a decision from review).

In sum, *Guillen* is not final or ripe, and *Whitmer* may be moot. Neither case alone presents the Court with a final, genuinely adversary issue whose determination by this Court will undoubtedly affect the outcome of the case:

> The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted); *see generally*, FEDERAL JURISDICTION, *supra*, § 2.2 ("The Prohibition Against Advisory Opinions"). Thus, unless the Court treats these two cases as one (*i.e.*, accepts both the finality of *Whitmer* and the ongoing controversy of *Guillen*), then the Court

lacks jurisdiction to consider this appeal. If the Court chooses to accept review, then it should accept both cases.

B. The Court Should Decline To Exercise Its Certiorari Jurisdiction Over This First Decision By Any Court To Consider The Constitutionality Of The 1995 Amendment To Section 409, And This First Decision Analyzing Section 409 In Light Of This Court's Analyses In *Lopez* and *Morrison*.

The Court need not exercise its certiorari jurisdiction over this case, but should await additional decisions by other state and federal courts before deciding whether it is important for the Court to review this question. Contrary to the County's assertions, Petition at 7, the decision of the Washington Supreme Court does not conflict with any decision of any other state or federal court. The Washington Supreme Court was the first court to specifically consider the constitutionality of the 1995 amendment to § 409, and the first court to evaluate § 409 in light of this Court's decisions in *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995). Since no other case has resolved these issues, there is no conflict with any decision of another state court or United States Court of Appeals, S.Ct. Rule 10(b), or conflict with any relevant decision of this Court. Rule 10(c).

Petitioner County mischaracterizes the decision of the Supreme Court in asserting that it "conflicts with [every] decision of [ ]other state court[s] of last resort [and] of United States Court of Appeals." Petition at 7. The Washington Supreme Court did not question the constitutionality of the pre-1995 § 409 because the parties

assumed its constitutionality: "[I]t is uncontested that Congress had authority to enact § 409 in its *pre*-1995 form, insofar as the privilege was understood to apply only to materials and data created *exclusively* to comply with the federal government's mandates." 31 P.3d at 648 n.26, App. A 75 (italics in original).

The County fails to cite any other case that has expressly considered the constitutionality of the 1995 amendment, and the Whitmers are not aware of any such case. One Louisiana Court of Appeals decision cited by the County considered the constitutionality of the statute as a whole, but did not focus on the 1995 amendment, relying heavily on a pre-1995 case. *Palacios v. Louisiana and Delta RR*, 775 So.2d 698, 703 (La. App. 2000) (relying on *Martinolich v. Southern Pac. Transp.*, 532 So.2d 435, 438 (La. App.), *cert. denied*, 490 U.S. 745 (1988)).

The Washington Supreme Court decision is also the first to consider the constitutionality of § 409 in light of *Morrison* and *Lopez*. It is fair to assume that both federal and state courts will strike down other federal statutes under the *Morrison/Lopez* analysis. It is neither necessary nor desirable for this Court to grant certiorari to review every such decision. Rather, it is preferable for this Court to await more decisions by state courts, providing a richer fund of experience and fact patterns to assist in determining the necessity of review by this Court, and providing breadth and depth for any eventual review.

Petitioner County argues that certiorari is appropriate because the Washington Supreme Court decision "lessens the ability of state government to protect its

traveling public" and jeopardizes the safety of Washington's citizens. Petition at 8, 30. Petitioner's policy argument does not support certiorari jurisdiction. Washington State has made a policy determination that the safety of its citizens is best protected by waiving sovereign immunity and holding governmental units liable to the same extent that private parties are liable. 31 P.3d at 643 n.19, App. A 51. The voters of Washington have emphatically adopted a " 'strongly worded mandate for broad disclosure of public records.' " 61 P.3d at 637, App. A 24 (*quoting Spokane Police Guild v. Liquor Control Bd.*, 769 P.2d 283, 284 (Wash. 1989)). This Court need not concern itself with the wisdom of Washington State's policies of governmental liability and full disclosure of public records.

Ultimately, it is not necessary for this Court to grant the petition for certiorari because the Washington Supreme Court correctly decided the case, as the balance of this answer explains.

C. The County's Supremacy Clause Argument Is Tautological In That A Federal Statute Is Only The Supreme Law Of The Land If It is Made Pursuant To Powers Delegated To Congress By The Constitution.

The County argues that the Washington State Supreme Court violated the Supremacy Clause when it struck down a portion of § 409. Petition 8-13. But, as the Washington Supreme Court noted, "State law cannot be preempted by an unconstitutional federal law." 31 P.3d at 647, App. A 73. The Washington Court reasoned:

The Supremacy Clause, U.S. CONST. art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

Thus, state judges are constitutionally required only to uphold "laws of the United States *which shall be made in pursuance [of the United States Constitution].*" U.S. CONST., art. VI, cl. 2 (emphasis added). Federal laws that exceed Congress' enumerated constitutional powers are unenforceable in state court – just as they are in federal court – whether or not Congress intended its laws to preempt "the Constitution or laws of any state." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Id. App. A 74-75 (italics in original) (footnotes omitted).

Petitioner County apparently failed to grasp the significance of the Washington Court's decision, for the County omits from its quotation of the Supremacy Clause the operative phrase "made in pursuance thereof". Petition at 10. Thus, the County fails to understand that the Supremacy Clause is not a source of congressional power. Section 409 can be justified only under the Spending Clause or the Commerce Clause, but as we now show, neither clause authorizes the 1995 amendment.

D. The 1995 Amendment Is Not Authorized By The Spending Clause Because: The Federal Interest In Safe Roads Is Not Sufficiently Related To A Prohibition On Discovery/Admission Of Data And Documents Originally Prepared For Routine State And Local Purposes; And Congress Never Gave The States The Choice Of Accepting Or Rejecting § 409, But Imposed § 409 "Notwithstanding Any Other Provision Of Law."

The 1995 amendment cannot be justified under the Spending Clause. U.S. CONST. art. I, § 8, cl. 1. First, conditions imposed under the Spending Clause must be related to the federal interest in particular national projects or programs. The 1995 amendment prohibits the discovery/admission of documents prepared for routine state and local purposes, but otherwise "collected" for possible use pursuant to 23 U.S.C. §§ 130, 144, or 152. There is no federal interest in prohibiting the discovery/admissibility in state court proceedings of data and documents originally prepared for routine state and local purposes. Second, § 409 is not a Spending Clause statute in any event because it does not purport to give the states the choice of accepting or rejecting particular conditions on the availability of federal funding.

This Court explained Congress' power under the Spending Clause in *South Dakota v. Dole*, 483 U.S. 203 (1987). *Dole* considered the constitutionality of 23 U.S.C. § 158, which directed the Secretary of Transportation to withhold a portion of federal highway funds from states that permitted persons under the age of 21 to purchase and publicly possess any alcoholic beverage. Here, the

Washington Supreme Court quoted this Court's summary of the general restrictions on the proper exercise of Congress' spending power:

> [First,] the exercise of the spending power must be in pursuit of "the general welfare." In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously. . . . " Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." *Massachusetts v. United States*, 435 U.S. 444 (1978) (plurality opinion). *See also Ivanhoe Irrigation Dist. v. McCracken*, [357 U.S. 275, 295, (1958)], ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof"). Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

31 P.3d at 650, App. A 86-87 (*quoting Dole*, 483 U.S. at 207-08 (some citations omitted by Washington Supreme Court)). The Washington Supreme Court quoted the dissenting opinion of Justice O'Connor that Congress "is not entitled to insist as a condition of the use of highway funds that the state impose or change regulations in other areas of the state's social and economic life because of an attenuated or tangential relationship to highway use or

safety." 31 P.3d at 650 n.34, App. A 88 (*quoting Dole*, 483 U.S. at 215 (O'Connor, J., dissenting)).

The Washington Supreme Court found that the 1995 amendment to § 409 failed the third restriction of the *Dole* test, in that the amendment was too attenuated or tangential to the federal purpose:

> We find that no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and "raw data" that were originally prepared for routine state and local purposes, simply because they are "collected," for, *among other reasons*, pursuant to a federal statute for federal purposes.

31 P.3d at 651, App. A 92-93 (italics in original).

The Washington Supreme Court's analysis is correct. Petitioner County identifies the purposes of § 409 as facilitating candor in administrative evaluations of highway safety hazards and preventing private tort plaintiffs from using governmentally created records to establish governmental liability for negligence. Petition at 14, 18. The Washington Supreme Court acknowledged that the pre-1995 § 409 facilitated candor by prohibiting the discovery or admission of documents actually compiled by governmental units as part of an application for federal funding for highway safety enhancement. But there is only the most attenuated or tangential relationship between administrative candor and the 1995 amendment prohibiting the discovery/admission of documents or data which are compiled for local or state purposes and

simply happen to be filed in the county engineer's safety enhancement "black hole." 31 P.3d at 644, App. A 56.

For example, state and local police are independently required to prepare the accident reports sought by the Guillens and the Whitmers, and blocking access to those reports has nothing to do with administrative candor. Similarly, County officials will be no less candid in evaluating highway safety enhancements if they must produce private traffic studies performed for a Chevron station and a McDonald's restaurant, citizen complaints, or a letter of complaint from a Pierce County Council member to the County Engineer. Nor is there a sufficiently close relationship between the federal goal of highway safety enhancement and the apparent purpose of § 409 to hinder or defeat private negligence actions against public entities.

Furthermore, the Spending Clause does not authorize § 409 for an even more fundamental reason – § 409 is not a Spending Clause statute. As the Court noted in *Dole*, incident to the spending power, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.' " *Dole*, 483 U.S. at 206 (*quoting Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (Opinion of Burger, C.J.)). The statute at issue in *Dole*, 23 U.S.C. § 158, illustrates the principle. Congress directed the Secretary of Transportation to withhold a portion of federal highway funds from states that failed to adopt a minimum age of 21 for the purchase or public possession of alcoholic beverages. In other words, the 21-year drinking age

was not mandatory; the states had the option of adopting it or not. And Congress did not attempt to impose the minimum drinking age itself, but left it to the states to adopt a minimum drinking age.

But unlike § 158, § 409 does not give the states the option of disclosing or admitting documents and data. Nor does § 409 condition federal funding upon compliance with § 409, or authorize the Secretary of Transportation to withhold a single dollar of federal highway funds. Rather, in § 409 Congress itself prohibited discovery/admission of data and documents without giving the states any choice in the matter. Indeed, Congress expressly overrode the will of the states by prohibiting discovery/admission of data and documents, "Notwithstanding any other provision of law. . . . "

Petitioner County argues that § 409 is a Spending Clause statute because, "nobody made [the state] get into the safety enhancement program" and "because it is clear that participation in the funding program requires acquiescence to the intrusion. . . . " Petition at 20-21 (*quoting Sawyer v. Ill. Cent. Gulf RR Co.*, 606 So.2d 1069, 1074 (Miss. 1992), and *Martinolich*, 532 So.2d at 437). These assertions are demonstrably incorrect. Section 409 applies "Notwithstanding any other provision of law. . . . " The 1995 amendment applies to documents and data "collected for the purpose of identifying, evaluating or planning the safety enhancement of potential accident sites . . . pursuant to . . . [§] 152 of this title . . . of this title. . . . " Section 152 is mandatory like § 409: "Each state *shall conduct and systematically maintain* an engineering survey of all public roads to identify hazardous locations, sections, and elements. . . . " 23 U.S.C. § 152(a)(1) (emphasis

supplied). Nothing about § 152(a)(1) is conditioned in any way on federal funding.

Finally, even if § 409 were conditioned upon state acceptance, Petitioner County is wrong when it states that the Washington Legislature has "accepted the § 409 privilege. . . . " Petition at 10-11. Petitioner relies on Wash. Rev. Code § 47.04.050 through .070. Petition at 11 n.6. These statutes were first enacted in 1917 (Wash. Laws 1917, Ch. 76 §§ 1, 5), and most recently amended in 1961 and 1984. 1961 Wash. Laws, Ch. 13; 1984 Wash. Laws, Ch. 7 §§ 86, 87. The Washington Legislature accepted all conditions on federal funding as of 1961 (and perhaps as of 1984), but the Legislature has never accepted § 409, which was enacted in 1987. *Diversified Investment v. DSHS*, 775 P.2d 947, 949 (Wash. 1989) ("It is well settled in Washington that the Legislature may not constitutionally attempt to adopt future federal law by statute.") Accordingly, even if § 409 were a condition on the receipt of federal funds under the Spending Clause, the Washington Legislature has never accepted the condition and the Spending Clause cannot authorize Petitioner County to withhold the ordered information.

E. The 1995 Amendment Is Not Authorized By The Commerce Clause Because The Discovery/ Admission Of Data And Documents Originally Prepared For Routine State And Local Purposes Does Not Substantially Affect Interstate Commerce Under *Lopez* And *Morrison*.

The Washington Supreme Court carefully weighed under this Court's recent decisions in *Lopez* and *Morrison*

the relationship between the 1995 amendment and interstate commerce. The Washington Supreme Court found this relationship insufficient to justify the 1995 amendment under the Commerce Clause. U.S. CONST. art. I, § 8, cl. 18.

In *Lopez* and *Morrison*, this Court summarized congressional power to regulate three broad categories of activity under the Commerce Clause: channels of interstate commerce; instrumentalities of interstate commerce; and activities that "substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59; *Morrison*, 529 U.S. at 608-09. The 1995 amendment does not regulate the channels or instrumentalities of interstate commerce, leaving only the issue of whether it regulates activities substantially affecting interstate commerce. *Morrison* and *Lopez* identified four factors that provide the proper framework for analyzing this third category of Commerce Clause regulation: whether the activity involves any sort of economic enterprise; whether the statute contains an express jurisdictional element limiting its reach to activities having an explicit connection with or effect on interstate commerce; whether the statute's legislative history contains express congressional findings regarding the effects on interstate commerce; and whether the link between the regulated activities and a substantial effect on interstate commerce is "attenuated." *Morrison*, 529 U.S. at 610-12.

In *Morrison*, the Court held that the federal Violence Against Women Act of 1994 could not be sustained under the Commerce Clause because it failed each of these tests and because the link between gender-related violence and interstate commerce was too attenuated. Similarly, in

Lopez the Court struck down the Gun-Free School Zones Act of 1990 for the same reasons.

The 1995 amendment cannot be sustained under the Commerce Clause for the same reasons that the *Morrison* and *Lopez* statutes were struck down. First, the discovery or admission of reports and information in a state court adjudicating a state claim is not economic activity within the meaning of the Commerce Clause. State court litigation is not commercial activity, and it is certainly not commercial activity in interstate commerce. To the contrary, litigation of state claims in state courts is by definition a local concern committed to the power of the states. If state court litigation were economic activity under the Commerce Clause, then Congress could presumably regulate every aspect of state court litigation. "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." *Lopez*, 514 U.S. at 580 (quoted in *Morrison*, 529 U.S. at 611).

Second, the 1995 amendment lacks any express jurisdictional element that might establish an explicit connection with or effect on interstate commerce. The prohibition of the statute extends to all litigation, whether the litigation arises out of interstate commerce or a purely local auto collision. Section 409 prohibits the discovery/admission of documents compiled or collected for the purpose of § 152. Even § 152 is not limited in any way to interstate commerce. Rather, under § 152 the state must survey "all public roads" and identify dangers to "motorists", "bicyclists" and "pedestrians." 23 U.S.C.

§ 152(a)(1). The vast majority of such hazards plainly have nothing to do with interstate commerce.

Third, Congress failed to make any findings regarding the 1995 amendment's effect on interstate commerce. Congress not only failed to provide findings, but there is no statement of legislative intent regarding § 409. 31 P.3d at 641, App. A 40-41. Despite the lack of any congressional statement, courts deduced a two-fold purpose in the pre-1995 § 409: (1) to deny private plaintiffs a "virtually no-work tool"; and (2) to facilitate candor in administrative evaluations of highway safety hazards. Denying a "no work tool" to private plaintiffs has nothing to do with interstate commerce. The second purpose, facilitating candor in administrative evaluations, is arguably related to interstate commerce in so far as the pre-1995 § 409 precluded discovery/admission of documents expressly compiled for federal funding applications. But the "administrative candor" link was severed by the 1995 amendment, which denied discovery/admission of documents and data generated independently of the federal highway safety funding scheme.

Fourth, linking the 1995 amendment to a substantial effect on interstate commerce requires a chain of reasoning that is too attenuated: local government bodies already generate and receive substantial documents and data relating to road conditions, including police accident reports, traffic counts, citizen complaints, and traffic studies for private business purposes; discovery/admission of these documents will deter local officials from collecting this data, in disregard of their other responsibilities under local and state law; this decreased willingness to collect data and documents will cause local

officials to make poor decisions in prioritizing road safety enhancement projects; federal funds will be spent less efficiently; fewer road hazards will be eliminated; roads will not become less hazardous; interstate commerce will be substantially affected. As the Court observed in *Lopez* and *Morrison*, if such a long and tangential cause-and-effect chain is sufficient to sustain regulations under the Commerce Clause, then Congress could regulate virtually any activity conducted within the state. *Lopez*, 514 U.S. at 563; *Morrison*, 529 U.S. at 613, 615-16. As the Washington Supreme Court concluded:

> It is therefore entirely reasonable that the privilege should cover "reports," "surveys," "schedules," "lists" and "data" that would not exist *but-for* 23 U.S.C. §§ 130, 144, and 152. *See* [*S. Pac. Transp. Co. v.*] *Yarnell*, 890 P.2d [611] at 614 [Ariz. 1995]. However, we fail to see how those vital federal purposes are reasonably served by also barring the discovery and admissibility in state court of routinely prepared state and local traffic and accident materials and data that would exist even had a federal safety enhancement program never been created, such as collision photographs, traffic counts, citizen complaint letters, and "raw data" relating to the history of a local traffic intersection. Such a broad privilege lacks the requisite nexus to § 409's raison d'etre and cannot reasonably be characterized as an "integral part" of the Federal-aid highway system's regulation. *Hodel [v. Indiana]*, 452 U.S. [314] at 328 n.17 [1981].

31 P.3d at 654, App. A 104-05 (italics in original).

F. The Necessary And Proper Clause Does Not Authorize The 1995 Amendment To Section 409.

The Washington Supreme Court also appropriately concluded that although the pre-1995 § 409 might have been necessary and proper in the exercise of the Commerce Clause, the 1995 amendment was not:

> But while the federal government enjoys authority to require state courts to enforce a federal privilege protecting materials that would not have been created but-for federal mandates such as those in §§ 130, 144, and 152, we conclude that it was neither "necessary" nor "proper" for Congress in 1995 to extend that privilege to traffic and accident materials and raw data created and collected for state and local purposes, simply because they are *also* collected and used for federal purposes.

31 P.3d at 654-55, App. A 107-08 (italics in original). The Necessary and Proper Clause adds nothing substantive. U.S. CONST. art. I, § 8, cl. 18. It cannot justify actions otherwise authorized by the Commerce and Spending Clauses.

G. Petitioner's 10th Amendment Red Herring Ignores The Only Standing Analysis Applicable Here, But Plaintiffs Suffered A Personal Injury Caused By The 1995 Amendment And Redressable In State Court In Any Event.

Petitioner ignores the only standing analysis applicable here. Standing is a limitation on federal court power. *See, e.g., Allen v. Wright*, 468 U.S. 737, 750 (1984) ("The case-or-controversy doctrines state fundamental limits on

federal judicial power in our system of government."); *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Therefore, the federal standing doctrines do not apply in state courts. *See, e.g., ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute." (citations omitted)).

The plaintiffs plainly had "standing" to sue in Pierce County Superior Court, seeking redress for the injuries they suffered in two car crashes. Assuming finality and ripeness, this Court has jurisdiction over appeals from a state's highest court in such cases. 28 U.S.C. § 1257. There is no standing problem here.

Equally plainly, plaintiffs had "standing" (actually, the right) to litigate Petitioner County's claim that § 409 prevented discovery of relevant documents in their tort actions. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast*, 392 U.S. at 99. Again, a party seeking redress for injuries negligently inflicted by a defendant has standing to sue in state court, and the due process right to proper discovery.

But assuming for argument's sake that federal justiciability requirements applied in state courts, then these plaintiffs were personally injured by the 1995 amendment's unconstitutional bar to civil discovery, an injury

properly redressed by the Washington Supreme Court's ruling. *See, e.g., Allen*, 468 U.S. at 751 ("A plaintiff must allege [1] personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief"). These plaintiffs have standing.

As the County acknowledges, these plaintiffs did not "assert" the 10th Amendment, but rather relied on the Commerce and Spending Clauses. First, after Pierce County asserted the 1995 amendment to § 409 as an objection to plaintiffs' discovery requests, plaintiffs argued that the Commerce Clause did not authorize this amendment. It is well established that individual plaintiffs have standing to assert, as here, that the Commerce Clause does not authorize a particular federal statute that harms the individual in a specific way. *See, e.g., Morrison, supra* (defendants successfully challenged Congress' power to enact 42 U.S.C. § 13981 under Commerce Clause); *Lopez, supra* (defendant successfully challenged Congress' power to enact 18 U.S.C. § 922(q)(1)(A) under Commerce Clause). The 10th Amendment adds nothing to this argument, and no standing problems exist in this case.

It is also well established that an individual challenging the constitutionality of a federal statute in federal court "must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1928). As a result, individuals normally have more difficulty establishing

standing to litigate whether the Spending Clause authorizes Congress to adopt a particular condition on disbursements to the states. Such challenges are typically brought by states. *See, e.g., Dole, supra.* If an individual wished to challenge (for instance) Congress's condition requiring a higher drinking age, then he would have to challenge the state's adoption of the statute raising the drinking age (the action that actually caused his alleged "harm"), rather than Congress's imposition of the condition.

But here, the Whitmers and Guillens are in a unique position. They were directly injured by the 1995 amendment because, as noted above, Congress did not require the states to adopt a law as a condition to funding, or even seek the state's acceptance of the condition, but rather directly imposed a specific bar to discovery in all state courts, "[n]otwithstanding any other provision of law . . . ." 23 U.S.C. § 409. Congress has thus directly attempted to deprive these plaintiffs of discoverable information relevant to proving their claims. Again, if the standing requirements (personal injury, causation and redressability) apply, then they are met in this case.

Petitioner County places undue reliance on *dicta* (not a "ruling") from *Tennessee Electric Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118 (1939) ("*TEPC*"). There, several power companies brought a 10th Amendment challenge to the statute that created the Tennessee Valley Authority. This Court followed its precedents holding that damage incident to lawful competition is *damnum absque injuria*. 306 U.S. at 140. In the language of current standing doctrine, the *TEPC* plaintiffs lacked standing because

they suffered no cognizable personal injury.[2] The Court went on to say that competition is not actionable even when the competitor is a federal agency, unless the state itself objects. 306 U.S. at 143-44. This *dicta* is not binding, however, and does not apply where, as here, the plaintiff suffers a personal injury caused by Congress and redressable in state court.

In sum, federal justiciability doctrines do not apply in state courts, and these plaintiffs plainly had standing to sue. Even if those doctrines apply, these plaintiffs suffered personal injuries (deprivation of discoverable evidence relevant to proving their claims) reasonably traceable to the 1995 amendment, and redressable by the state courts' decision invalidating the 1995 amendment. The 1995 amendment is unconstitutional because it is not authorized by the Commerce or Spending Clauses.

---

[2] Pierce County also relies on several decisions in which other courts, like *TEPC*, held that individuals who suffer no personal injury have no standing to assert the 10th Amendment. *Mountain States Legal Fnd. v. Costle*, 630 F.2d 754, 761-72 (10th Cir.), *cert. denied*, 450 U.S. 1050 (1980) (only cognizable injury is to state – which denied any injury – not to the plaintiffs); *Vermont Assembly of Home Health Agencies, Inc. v. Shalala*, 18 F. Supp. 2d 355, 371 (D. Vt. 1988) (same).

CONCLUSION

For the foregoing reasons, the Whitmers respectfully ask the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted this 27th day of March 2002.

KEITH L. KESSLER
GARTH L. JONES
STRITMATTER KESSLER
WHELAN WITHEY
COLUCCIO
413 – 8th Street
Hoquiam, WA 98550
(360) 533-2710

*CHARLES K. WIGGINS
KENNETH W. MASTERS
WIGGINS LAW OFFICES, P.L.L.C.
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

RICHARD H. BENEDETTI
DAVIES PEARSON, P.C.
920 Fawcett – P.O. Box 1657
Tacoma, WA 98401
(253) 572-3052

Counsel of Record

APPENDIX K

The Honorable Rudolph J. Tollefson
Department #2

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

ROBERT and LuANN WHITMER, husband and wife, individually, and as the guardians of SHANA WHITMER, an incapacitated person, HANNAH WHITMER, a minor, and DENEL WHITMER, an incapacitated person, Plaintiffs, vs. CHIN S. YUK and SUN YEONG YUK, husband and wife, and the marital community composed thereof, and CHANG CHOI; and the CITY OF LAKEWOOD, a municipal corporation; PIERCE COUNTY, a municipal corporation; and CITY OF TACOMA, a municipal corporation, Defendants.	No. 97-2-07236-6 ORDER LIFTING STAY, COMPELLING DISCOVERY AND CONTINUING DEFENDANTS CITY OF TACOMA'S MOTION FOR SUMMARY JUDGMENT (Filed Feb. 11, 2000)

THIS MATTER having come on before the undersigned Judge of the Pierce County Superior Court upon the Plaintiffs' Motion to Lift Stay, Compel Discovery, and to Continue the City of Tacoma's Motion for Summary Judgment; and the parties being represented by counsel; and the Court having reviewed the responsive pleadings of the parties and the exhibits and records on file herein, and being fully advised; it is hereby

~~**ORDERED that the stay of proceedings is hereby lifted, and it is further**~~ [**ORDERED** that the stay of proceedings will continue until the Supreme Court accepts or rejects review of this matter /s/ RJT, RHB, KLK, HTD, JFH]

ORDERED ~~that the Defendant City of Tacoma's Motion for Summary Judgment currently scheduled for hearing on February 11, 2000 is hereby continued until such time as further discovery is completed; and it is further~~ [/s/ RJT, RHB, KLK, HTD, JFH]

ORDERED that the Plaintiffs' Motion to Compel Discovery is granted, and the Defendants Pierce County and City of Lakewood are ordered to turn over the following documents to plaintiffs [subject to the provisions hereinabove. /s/ RJT, RHB, KLK, HTD, JFH]

(See Exhibits "A" and "B" attached hereto and made a part hereof).

DATED this 11 day of February, 2000.

/s/ Rudolph Tollefson
HON. RUDOLPH J. TOLLEFSON

[THE COURT FURTHER CERTIFIES THAT THIS ORDER INVOLVES A CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS SUBSTANTIAL GROUND FOR A DIFFERENCE OF OPINION AND THAT IMMEDIATE REVIEW OF THIS ORDER MAY MATERIALLY ADVANCE THE ULTIMATE DETERMINATION OF THE LITIGATION. /s/ RJT, RHB, KLK, HTD, JFH]

Presented by:
DAVIES PEARSON, P.C.

By: /s/ James B. Lynch
WSB# 22531 for Mr. Benedetti
RICHARD H. BENEDETTI
WSBA# 6330
Attorneys for Plaintiffs Whitmer

STRITMATTER KESSLER WHELAN WHITHEY

By: /s/ Keith L. Kessler
KEITH L. KESSLER
WSBA #4720
Attorneys for Plaintiff Shana Whitmer

/s/ [Illegible]
/s/ Harold T. Dodge

/s/ Jeff F. Hale attorney for City of Tacoma

EXHIBIT #A

WHITMER
DOCUMENTS CLAIMED TO BE
PRIVILEGED UNDER 23 U.S.C. § 409

Claimed by Pierce County:

1. Multi-file Inventory Listing Detail: Computer Print out of accident information that would be retained in computer file

2. Accident Reports – Dated:
   9/24/90, 7/21/93, 1/6/96, 6/11/90, 6/9/93, 3/28/90, 5/14/93, 11/13/91, 12/17/94, 9/25/92, 10/11/94, 4/24/92, 9/20/94, 7/31/90, 8/31/94, 4/2/91, 4/29/94, 12/11/92, 2/17/94, 9/25/92, 1/21/94, 9/3/92, 12/9/95, 7/27/92, 12/1/95, 4/24/92, 9/19/95, 3/13/92, 8/22/95, 2/25/92, 3/20/95, 9/24/93, 2/12/95, 4/2/93, 3/11/93, 4/7/93, 10/4/95, 10/6/95, 1/29/93, 4/20/92, 6/2/93, 11/23/94, 12/10/94, 1/27/90, 2/5/90, 4/7/93, 4/30/92, 5/7/92, 5/22/90, 8/4/92, 8/30/90, 11/1/91, 11/15/90, 11/21/91.

3. Computer Printout Pages 1990-1996; from 8/8/97 and 7/16/97; containing summary information on dates of accidents

4. Response to citizen complaint letter: original letter from Margaret Smith to Thomas Ballard; response letter, date 2/8/91 from Thomas Ballard to Margaret Smith concerning light and fixing cost of light at approximately $125,000

5. Tables 1-24 – Vehicular Traffic Evaluations and Traffic Signal Warrant Evaluation

6. Pierce County Public Works Signal Warrant Form

7. Vehicle Volume Summaries – Dated:
   12/11/90, 8/1/88, 11/7/95, 11/8/95, 9/30/93, 7/18/89, 9/21/95, 9/20/95, 6/7/94, 10/14/93, 7/14/92, 10/25/90, 7/18/91, 7/20/89, 7/25/9, [sic] 11/28/95, 7/14/92

8. State of Washington Urban Arterial Board Project Prospectus, revised 1/6/69

9. Pierce County Six-year Plans – 1990-1996

Claimed by City of Lakewood

1. Memo; 5/14/96; from Rory Grindley, Associate Traffic Engineer; to Bill Larkin, Engineering Manager, City of Lakewood; regarding Pierce County Public Works and Utilities Transportation Service Traffic Division Review of McDonald's Restaurant Traffic Impact Analysis

2. Private Traffic Impact Analysis for Chevron at 74th Street West and Lakewood Drive; 2/13/96

3. 75th Street W. and Custer Road (Lakewood Drive) Intersection Evaluation (augmenting Private Traffic Impact Analysis, supra #2.); 4/10/96

4. Private Traffic Impact Analysis for McDonald's at 75th Street W. and Lakewood Drive; 4/30/96

5. Handwritten extract of accident data for 75th Street W. and Custer Road and for the Curve between 74th Street West and 75th Street West for the years of 1994, 95, and 96.

6. Fax cover sheet; 2/12/97; from Grindley; to Larkin; transmitting Pierce County Level of Service calculations for 74th Street West and Lakewood Drive plus "assumed signal timing info used."

7. Handwritten notes and diagram of Custer Road at Lakewood Drive to 75th Street W. showing "ADT COUNTS PM Peak". 1 page.
8. City of Lakewood Six Year Comprehensive Transportation Program: Amended 1997 & 1998 – 2003.
9. Documents associated with the Urban Arterial Trust Account (UATA)
   - Urban Program Application: including "Transporation Improvement Board Funding Application Arterial Inventory Sheet" (two types: representing before and after the project).
   - Attachment A – Accident Reduction & Annual Benefit" pertaining to intersection of 75th Street W. and Lakewood Drive
   - "Attachment B – Annual Benefit Summary Sheet"
   - "Transportation Improvement Board controlled Intersection Data Continuation Sheet:" (two types: one pertaining to the intersection of 75th Street W. and Custer Road and one pertaining to both that intersection and the intersection of Lakewood Drive and Custer Road)

EXHIBIT #B

PIERCE COUNTY adv. Whitmer
Our File No. W-97-14473

PIERCE COUNTY DOCUMENTS NOT PRODUCED

4/18/74 letter from citizen to Pierce County

10/15/71 letter from William Thorton, Pierce County Public Works to Fred Weedon, Deputy Prosecuting Attorney

9/9/82 letter from Frederick Anderson, Pierce County, to citizen

6/29/98 note from Bruce to Peg

1969 Cross Reference Sheet

4/27/95 letter from Jim Ellison, Traffic Engineer, to Clover Park School District

10/29/92 letter from Jim Ellison, Traffic Engineer, to citizen

10/13/92 letter from citizen to Jim Ellison

3/21/91 letter from Tom Ballard to citizen

1/23/91 letter from citizen to Joe Stortini

2/8/91 letter from Tom Ballard to citizen

11/1/88 letter from business/citizen to Messrs. Wagar and Ellison

6/3/88 letter from Tom Ballard to citizen

5/18/88 letter from citizen to Tom Ballard

4/15/86 letter from Jim Ellison to Mike Pan, with attachment

4/25/84 memo from Tom Ballard to Fred Anderson

4/24/84 memo from Jim Ellison to Tom Ballard

10/94 Cross Reference Sheet

Undated Cross Reference Sheet

6/22/60 Cross Reference Sheet

Four undated photographs of Custer Road

8/31/72 letter from C.L. Mitchell to Department of Highways

11/29/61 letter from Keith Jones, County Engineer, to citizen

11/21/61 letter from Lee, Krilich, Anderson to T.F. Jones

5/19/61 letter form [sic] citizen to Keith Jones

5/10/61 memo from Keith Jones to citizen

Undated Custer Road bid sheet

10/1/71 letter from attorney to Fred Weedon & George Tyler

Undated handwritten letter from George to Bill

9/8/70 letter from Wm. R. Thorton, Public Works Director, to citizen

8/11/70 letter from citizen to Wm. R. Thorton

8/13/70 letter from Brewer Thompson to citizen

8/11/70 letter from citizen to Brewer Thompson

8/3/94 letter from citizen to Jim Ellison

8/1/94 letter from Jim Ellison to citizen

8/1/94 letter from Jim Ellison to business/citizen

7/6/94 letter from citizen to Pierce County Sheriff's Office

2/8/91 letter from Tom Ballard to citizen

Traffic Signal Priority Array Summary

12/7/83 letter from citizen to Frederick Anderson

10/3/83 letter from Frederick Anderson to citizen

10/3/83 letter from Frederick Anderson to citizen

7/28/83 letter from citizen to Booth Gardner

8/3/83 letter from Booth Gardner to citizen

8/1/83 memo from Dave to Fred Anderson

8/3/83 letter from Booth Gardner to citizen

8/3/83 memo from Dave to Fred Anderson

7/29/83 letter from citizen to Booth Gardner

Supreme Court, U.S.
FILED
MAR 27 2002
CLERK

No. 01-1229

In The

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF IN OPPOSITION

SALVADOR A. MUNGIA
WSBA #14807
Counsel of Record
DARRELL L. COCHRAN
WSBA #22851
J. BRADLEY BUCKHALTER
WSBA #29295
1201 Pacific Avenue
Suite 2200
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

3619

QUESTIONS PRESENTED

23 U.S.C. § 409 prohibits the discovery or admission in state courts of information "compiled or collected [by a state governmental entity] for the purpose" of obtaining federal funding for improved road safety. On interlocutory appeal, the Washington Supreme Court, while leaving intact the validity of § 409, ruled that a 1995 amendment unconstitutionally expanded the scope of the Act to include traffic accident data collected by state officials pursuant to Washington law and unrelated to federal funding. The court remanded the matter, directing the trial court to apply the enunciated standards to resolve the parties' discovery dispute. Pierce County now asks this Court to grant certiorari to hear this interlocutory appeal.

Has Pierce County shown compelling reasons why this Court should accept certiorari where:

- The appeal is interlocutory, involving pretrial discovery disputes;

- Only three state courts of last resort have ruled on the scope of the 1995 amendment and none considered, much less decided, the issue addressed by the Washington Supreme Court;

- The Washington Supreme Court's decision does not conflict with relevant decisions of this Court?

TABLE OF CONTENTS

Page

RESPONDENTS' COUNTER STATEMENT 1

I. THIS COURT LACKS JURISDICTION TO ACCEPT CERTIORARI 5

II. EVEN IF JURISDICTION EXISTS, THIS COURT SHOULD NOT ACCEPT REVIEW BECAUSE THIS IS AN INTERLOCUTORY APPEAL 10

III. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THIS CASE DOES NOT MEET THE REQUIREMENTS OF SUPREME COURT RULE 10 11

A. The Washington Supreme Court's decision does not conflict with the decisions of other courts of last resort 12

B. The Washington Supreme Court did not decide an important federal question 15

C. The Washington Supreme Court's decision, instead of conflicting with relevant decisions of this Court, follows them ... 20

1. Neither the Supremacy Clause nor the Necessary and Proper Clause are independent bases of constitutional authority 23

TABLE OF CONTENTS – Continued

Page

2. The federal government does not have an interest in prohibiting the use of state gathered information under state law in state courts in carrying out the purpose of § 152 and thus did not have authority under the Spending Clause to effect such a result ... 24

3. The challenged provisions are not an integral part of the regulatory program and thus Congress did not have authority under the Commerce Clause to prohibit raw traffic data from being introduced into evidence in state court proceedings 26

4. If Congress had intended the scope of § 409 to be as broad as Pierce County is urging, then it could not be authorized under the Necessary and Proper Clause 27

CONCLUSION 27

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) 20, 23

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985) 16

Atlanta Gas Light Co. v. United States Dep't of Energy, 666 F.2d 1359 (11th Cir. 1982) 22

City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997) 21

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) 8

Dillard v. Baldwin County Commissioners, 225 F.3d 1271 (11th Cir. 2000) 22

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988) 16

Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999) 22

Gregory v. Ashcroft, 501 U.S. 448, 100 S. Ct. 2758, 115 L. Ed. 2d 410 (1991) 16, 19

Helstoki v. Meanor, 442 U.S. 500, 99 S. Ct. 244, 61 L. Ed. 2d 30 (1979) 9

Hodel v. Indiana, 452 U.S. 314, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981) 26

Jefferson v. City of Tarrant, Alabama, 522 U.S. 75, 118 S. Ct. 481, 139 L. Ed. 2d 433 (1997) 6, 7, 9

TABLE OF AUTHORITIES – Continued

Page

New York v. United States, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) 20, 22

Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) 9

Printz v. United States, 521 U.S. 898, 117 S. Ct. 2365, 128 L. Ed. 2d 914 (1997) 21, 23, 27

Radio Station WOW v. Johnson, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092 (1945) 10

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 68 S. Ct. 972, 92 L. Ed. 1212 (1948) 10

Seminole Tribe v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) 21

Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030 (11th Cir. 1992) 22

South Dakota v. Dole, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) 24

Steward Machine Co. v. Davis, 301 U.S. 548, 57 S. Ct. 883, 81 L. Ed. 1279 (1937) 22

United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 616 (1995) 20, 21, 26

United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) 20

STATE CASES

Ex parte Alabama Dep't of Transp., 757 So.2d 371 (Ala. 1999) 12, 13, 19

Dep't of Transp. v. The Superior Court of Solano County, 47 Cal.App.4th 852 (Cal. App. 1996) 18

TABLE OF AUTHORITIES – Continued

Page

Irion v. State, 760 So.2d 1220 (La. App. 2000) 17, 18, 19

Light v. State, 560 N.Y.S. 2d 962 (N.Y. Ct. Cl. 1990) 17

Reichart v. State, 694 So.2d 193 (La. 1997) 12, 14, 15

Walden v. Dep't of Transp., State of Alaska (Alaska 2001) 12, 13, 14

FEDERAL STATUTES

23 U.S.C. § 409 ..... *passim*

23 U.S.C. § 152 ..... *passim*

28 U.S.C. § 1257 6

H.R.Rep. 104-246 § 328 18

OTHER AUTHORITIES

19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 202.03 (3d ed. 2001) 10

BRIEF IN OPPOSITION

Respondents Ignacio Guillen and Mariano Guillen respectfully request this Court to deny the petition for writ of certiorari seeking review of the opinion of the Washington Supreme Court.

RESPONDENTS' COUNTER STATEMENT

In July 1996 Clementina Guillen was killed at an intersection in Pierce County, Washington.

Ignacio Guillen subsequently requested that Pierce County produce documents pursuant to the Washington Public Disclosure Act regarding prior accidents at the intersection. Guillen limited the documents he sought: "I want to make the record clear we are not seeking any reports that were specifically written for developing any safety construction improvement project at the intersection at issue." Pet., App. H at 4-5. Pierce County denied Guillen's requests, claiming the documents were privileged under 23 U.S.C. § 409.

Guillen subsequently sued Pierce County under Washington's Public Disclosure Act.[1] The trial court ordered Pierce County to produce (1) accident records prepared by the Washington State Patrol, (2) two collision diagrams, (3) police traffic collision reports and motor vehicle reports, and (4) a letter between county

[1] After the filing of the lawsuit, Pierce County disclosed all but five of the requested twenty documents.

employees. Pet., App. A at 9-10. The County appealed this ruling to Washington's intermediate appellate court.

While the appeal of the public disclosure action was pending, Guillen sued Pierce County for the death of his wife, Clementina, alleging that the County had been negligent by not providing a four-way controlled traffic device at this dangerous intersection. In the negligence lawsuit, Guillen propounded discovery to Pierce County seeking, among other items, information that could not possibly come within the scope of § 409:

> (1) the identity of Pierce County deputy sheriffs who had patrolled the intersection during the six years preceding Ms. Guillen's death;
>
> (2) the identity of all County employees, agents, or officials with knowledge of accidents at the intersection;
>
> (3) the identity of persons involved in accidents at the intersection.

Pierce County refused to comply with the discovery request, claiming privilege under 23 U.S.C. § 409. Guillen moved for an order compelling discovery. The trial court granted the order. Pierce County sought interlocutory review by the intermediate appellate court. The court granted review and consolidated the two appeals.

The court of appeals affirmed the trial court, holding that the requested documents were not exempt from discovery. In the court's opinion:

> [t]o apply Section 409 properly, a court must distinguish between (a) the agency (e.g., a law enforcement agency) that collects or compiles information for purposes *unrelated* to Section 152 and (b) the agency (e.g., a public works department or road department) that collects and compiles information *pursuant* to Section 152. Section 409 does not protect reports or data collected by the former, because the former was not acting pursuant to Section 152. Section 409 does protect reports or data collected by the latter, *provided* that the latter was acting "for the purpose of identifying, evaluating, or planning the safety enhancement of . . . hazardous roadway conditions . . . pursuant to" Section 152.

Pet., App. H at 18-19 (emphasis in original).[2]

The court of appeals rejected Pierce County's argument that "once the road department 'collects' reports 'pursuant to' Section 152, the public may no longer have access to them *in any form*." Pet., App. H at 20 (emphasis in original). According to the court, "[t]his argument contravenes the plain meaning of Section 409," "would extend Section 409 far beyond its purpose [of] neutraliz[ing] the litigation-aiding effect, if any, of Section 152 activity," and "would give the County carte blanche to render immune from discovery every accident report related to a public road within its territory, simply by

---

[2] Section 152 of the Act provides, in part:

> Each state shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists, bicycles, and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvements.

having its road department 'collect' the report." Pet., App. H at 20-22.

Pierce County sought and obtained review by the Washington State Supreme Court. After initial briefing, and although neither party had raised the issue, the court requested additional authority on the constitutionality of § 409. Ultimately, the court declined to follow the analysis used by the court of appeals. Instead, the court held that § 409 violated the Tenth Amendment.

The Washington Supreme Court, however, limited its holding to a single aspect of § 409: a 1995 amendment. The Washington Supreme Court:

- did not strike down the Act;
- did not rule that plaintiffs could discover reports written for federal funding;
- did not allow any discovery of data compiled or collected solely for the purpose of obtaining federal funding.

Instead, the court ruled that the federal government did not have the authority to enact a law prohibiting state courts from considering accident reports and data that had been prepared pursuant to state law regardless of federal funding opportunities.

Contrary to the County's framing of the issue, if this Court accepted certiorari, it would not be considering the constitutionality of § 409. A review of the Washington Supreme Court's decision would also not involve a review of the federal government's authority to preclude the introduction of reports and data collected and compiled by the state solely for purposes of obtaining federal

funding. Instead, this interlocutory discovery dispute involves a narrow question: whether the Washington Supreme Court properly interpreted the Act to preclude discovery and admissibility in state court proceedings data collected and compiled under required state law and, if that interpretation is correct, whether the Washington Supreme Court was correct in holding that such an interpretation would violate the Tenth Amendment.

Certiorari is not appropriate for three reasons. First, because this case arose on interlocutory appeal, this Court lacks jurisdiction to grant certiorari. Second, even if the Court has jurisdiction, Pierce County has failed to show why, as a matter of policy, this Court should review this interlocutory decision. Finally, Pierce County has failed to show that the Washington Supreme Court decided an important federal question in a way that conflicts either with the decision of another state court of last resort or with relevant decisions of this Court. Pierce County's petition should be denied.

I. THIS COURT LACKS JURISDICTION TO ACCEPT CERTIORARI.

Because the appeal to the Washington Supreme Court was interlocutory, because no final judgment or decrees have been entered, this Court lacks jurisdiction to grant certiorari.

The Guillen dispute arose on interlocutory appeal from two lawsuits: (1) a public disclosure action and (2) a tort action. Both required Pierce County to produce certain information regarding the intersection where Clementina Guillen was killed. In both actions, the trial courts

ordered Pierce County to produce the requested information. Pierce County, instead of complying with the orders, pursued interlocutory appeals. By obtaining interlocutory review, Pierce County never produced any documents in response to the trial courts' orders. Accordingly, the Washington Supreme Court could not enter a final judgment. Instead, the court remanded the matter to the trial courts to determine which documents fell within its ruling:

> Because the record contains insufficient facts to apply this standard to all of the disputed items, we vacate the lower courts' rulings and remand for supplementation of the record and further proceedings not inconsistent with this opinion.

Pet., App. A at 114.

Congress has limited the power of this Court to review state court judgments to those that are final. 28 U.S.C. § 1257(a). As this Court held in *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 118 S. Ct. 481, 139 L. Ed. 2d 433 (1997),

> [t]his provision establishes a firm final judgment rule. To be reviewable by this Court, a state court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein."

Jefferson, 522 U.S. at 81 (citation omitted). Absent a final judgment, this Court lacks jurisdiction to grant certiorari.

Id. at 80 (stating Court lacked jurisdiction to accept interlocutory review and dismissing writ of certiorari as "improvidently granted").

The decision of the Washington Supreme Court is not final. It does not effectively determine the litigation. It is, instead, an interlocutory decision relating to the intermediate step of discovery. The Washington Supreme Court did not rule which documents must be produced and which ones may be withheld. Instead, it remanded the case to the trial courts for further action consistent with the standards that it enunciated. No final judgment has been entered.

Under its firm final judgment rule, this Court consistently refuses to review interlocutory decisions such as the one here. *See Jefferson*, 522 U.S. at 84. There are four narrow exceptions to this rule, none of which apply here:

> [first,] cases in which there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings is preordained. . . . [Second,] cases . . . in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings. . . . [Third,] those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. . . . [Fourth,] those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking

> review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479-83, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).

This case does not fall within any of the exceptions to the final judgment rule. First, the decision of the Washington Supreme Court does not conclude or preordain the result of the negligence action. Instead, it merely clears the way for further discovery, moving the negligence action toward eventual trial. Moreover, in both the public disclosure suit and the negligence action, the trial courts must conduct evidentiary hearings before actually ing the standards announced by the Washington S Court.

Second, the court's decision will not demand review regardless of the outcome of the negligence action. As noted, all this decision does is to allow the tort action to proceed. The interpretation of § 409 is secondary to the tort action.

Third, Pierce County can obtain review of the Washington Supreme Court's decision after the negligence trial whether it wins or loses. Pierce County, because of the Public Disclosure Act lawsuit, has a basis for appealing

the Washington Supreme Court's ruling once a final judgment, with a clear record on the documents it is being required to produce, is entered.

Fourth, and finally, this is not an action where a decision on the federal question would make the state cause of action irrelevant. Instead, just the opposite is true here: the federal question is secondary to the state cause of action. In other words, any decision by this Court would merely determine the evidence to be admitted in the state proceedings still to come.

Although Pierce County argues in footnote one of its petition that this Court has jurisdiction, the cases upon which it relies do not support its argument. First, this Court has held that *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987), "is an extraordinary case," has "confine[d] it to the precise circumstances the Court there confronted," and has "clarif[ied] that [it] does not augur expansion of the exceptions stated in *Cox Broadcasting Corp.*" *Jefferson*, 522 U.S. at 83-84. As even Pierce County must acknowledge, the circumstances of this case differ greatly from the "precise circumstances" of *Ritchie*: Pierce County's right to obtain review is limited neither by the Double Jeopardy Clause nor respondents' "willingness to appeal." *Ritchie*, 480 U.S. at 48. Second, the Court in *Helstoki v. Meanor*, 442 U.S. 500, 99 S. Ct. 244, 61 L. Ed. 2d 30 (1979), not only dealt with the constitutionally guaranteed Speech or Debate Clause but also based its decision on analogies to the Double Jeopardy Clause. Neither principle applies here.

The Washington Supreme Court faced and decided the validity of an evidentiary privilege on interlocutory

review. It made no final decision allowing Pierce County to invoke the jurisdiction of this Court. Certiorari is inappropriate.

II. EVEN IF JURISDICTION EXISTS, THIS COURT SHOULD NOT ACCEPT REVIEW BECAUSE THIS IS AN INTERLOCUTORY APPEAL.

Even if this Court has jurisdiction to hear this interlocutory appeal, the basic policies underlying interlocutory appeals show that the acceptance of certiorari is not warranted.

This Court has offered numerous policy reasons for denying certiorari in cases on interlocutory appeal. First, the Court avoids piecemeal federal review of state court decisions. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67, 68 S. Ct. 972, 92 L. Ed. 1212 (1948). "This prerequisite for the exercise of the appellate powers of this Court is especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern." *Republic Natural Gas*, 334 U.S. at 67. Second, the Court seeks to avoid giving advisory opinions where there may exist no "case" or "controversy" in the sense of Article III. *See id.* at 67-69; *see also Radio Station WOW v. Johnson*, 326 U.S. 120, 123-24, 65 S. Ct. 1475, 89 L. Ed. 2092 (1945). Finally, because "many issues in a hotly contested litigation either become moot as the litigation progresses, or turn out to have had no effect on the end result," the finality rule helps relieve the burden on this Court. 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 202.03[1] (3d ed. 2001) *citing, Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380,

107 S. Ct. 1177, 94 L. Ed. 2d (1987) (stating that review of issues that may become moot or irrelevant would burden appellate courts).

The policies underlying this Court's reluctance to accept review of interlocutory appeals show why certiorari is inappropriate in this case. The dispute over § 409 represents one discrete issue in a case that has been prematurely halted by Pierce County's interlocutory appeal. Ultimately, the case may give rise to other issues requiring yet another appeal. To avoid a piecemeal appeal and its accompanying delay, this Court should deny certiorari and allow this case to run its course in the Washington courts.

This Court, as do all appellate courts, disfavors interlocutory appeals for very practical reasons. Pierce County has failed to show why, as a matter of policy, it is entitled to interlocutory review by this Court. This Court should deny the petition and allow the case to run its course in Washington courts.

III. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THIS CASE DOES NOT MEET THE REQUIREMENTS OF SUPREME COURT RULE 10.

As this Court has set forth in its rules, "certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Under Rule 10, the Court may consider granting certiorari in state court appeals if:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A. The Washington Supreme Court's decision does not conflict with the decisions of other courts of last resort.

Contrary to Pierce County's assertion that the Washington Supreme Court's decision conflicts with "every" decision of other courts of last resort and of the United States court of appeals, Pet. at 7, an examination of case law demonstrates just the opposite. The Washington Supreme Court has been the only court to consider the 1995 amendment under a Tenth Amendment analysis. Only three other state courts of last resort (Alabama, Alaska, and Louisiana) have considered the 1995 amendment as it relates to public roads.[3] None of those cases performed a constitutional analysis as to whether the federal government had the authority to preclude the use of state gathered information in state court simply because that same data were subsequently used for seeking federal funding.

---

[3] *See, e.g., Ex parte Alabama Dep't of Transp.*, 757 So.2d 371 (Ala. 1999); *Walden v. Dep't of Transp., State of Alaska*, 27 P.3d 297 (Alaska 2001); *Reichart v. State*, 694 So.2d 193 (La. 1997).

In *Ex parte Alabama Dep't of Transp.*, 757 So.2d 371 (Ala. 1999), the Alabama Supreme Court did not raise, address, or decide whether the 1995 amendment, if interpreted to preclude the use of raw data in state court proceedings, was constitutional. Instead, it held that although the plaintiff was not entitled to obtain information regarding prior auto accidents from the Alabama Department of Transportation he could obtain the same information from the Department of Public Safety:

> Further, we note that the information sought by Hitchcock – reports of accidents occurring at the site of Hitchock's accident – is under the custody and control of the Alabama Department of Public Safety. Hitchcock is not without a source for the information he alleges he requires in order to be able to proceed with any legal action to recover damages for his injuries.

Id. at 374.

Far from being inconsistent, Alabama reached the same result, albeit in a different manner, than the Washington Supreme Court.

In *Walden v. Dep't of Transp.*, 27 P.3d 297 (Alaska 2001), the Alaska Supreme Court, in dicta,[4] stated that a Department of Transportation Design Study Report was not subject to discovery because of § 409. (Here, Guillen stated that he was not seeking such reports.) The case did not address the 1995 amendment nor did it raise or

---

[4] The Alaska Supreme Court did not need to address that issue as the plaintiff's attorney failed to preserve the issue for appeal and, in fact, at trial, explicitly stated that she agreed that the report was inadmissible. *Id.* at 304.

analyze any potential constitutional infirmity regarding the 1995 amendment.

Walden did, however, review an issue regarding the use of prior accidents at the roadway in question. The plaintiff had discovered that there had been nine prior accidents at the section of road at issue. The trial court admitted evidence of two of those accidents. The plaintiff argued that evidence of a third accident should have been admitted. The Alaska Supreme Court upheld the trial court's decision. The Alaska Supreme Court noted the rule in Alaska that evidence of prior accidents is admissible to show notice of a defective or dangerous condition as long as the accident took place under substantially similar circumstances. The court held that the plaintiff failed to provide sufficient evidence that the third accident she sought to have admitted occurred under substantially similar circumstances. *Id.* at 303.

Thus, in Alaska, evidence of prior accidents using traffic accident evidence is admissible. Once again, the result is consistent with the result reached by the Washington Supreme Court.

In *Reichert v. State*, 694 So.2d 193 (La. 1997), the court addressed the issue of whether four documents that contained safety opinions should have been excluded by the trial court. Three letters were from the chief engineer of the Department of Transportation and Development to state representatives regarding the placement of a flashing beacon at the intersection where the accident occurred. The fourth document was a DOTD memorandum recommending against the installation of a flashing beacon. The court neither considered nor ruled upon any

constitutional issue regarding the 1995 amendment. Instead, the court ruled that the letters and memorandum were the types of materials to which § 409 applied and thus should have been excluded.[5]

An examination of the decisions by the courts of last resort that have addressed the 1995 amendment to § 409 as it relates to public roads shows that none of them have considered the constitutionality of the amendment. Moreover, the post-amendment decisions are all consistent with the result reached by the Washington State Supreme Court. Accordingly, for that reason alone, Pierce County has failed to meet its heavy burden of demonstrating why review should be granted under Rule 10(b).

B. The Washington Supreme Court did not decide an important federal question.

Pierce County has not demonstrated that the Washington Supreme Court decided an important federal question. Pierce County spends substantial time in its brief attempting to convince this Court that the Washington Supreme Court reached the wrong result. However, the County never articulated what important federal question the court decided. It is unable to do so because none exists.

An important federal question may have existed if Congress had explicitly stated that it intended § 409 or its

---

[5] Once again, Guillen agrees that reports containing conclusions or opinions about safety aspects of an intersection are not discoverable.

1995 amendment to prohibit the discovery and admissibility of all raw data, whether or not collected for purposes of federal funding. However, it did not and consequently there is no important federal question.

This Court consistently holds that if Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985). "This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 448, 461, 100 S. Ct. 2758, 115 L. Ed. 2d 410 (1991). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988).

In enacting or amending § 409, Congress did not state that it intended to place beyond discovery and admissibility information unrelated to federal funding. Instead, as the Washington Court of Appeals correctly understood, Congress distinguished between reports and data related to federal funding activity and reports and data unrelated to federal funding activity. Congress merely intended § 409 to have a neutralizing effect, as it did not wish to transform federal funding activity into a

"virtually no-work tool for direct use in private litigation." *Light v. State*, 560 N.Y.S. 2d 962, 965 (N.Y. Ct. Cl. 1990). Put another way, "Congress did not want any party involved in litigation to be better off, **or for that matter worse off**, by reason of a State's participation in seeking [federal] funding." Pet., App. A at 121 (Madsen, J., concurring) (emphasis added).

Other state courts addressing the 1995 amendment to § 409 as it applies to public roads recognize that raw data unrelated to federal funding is not privileged under § 409. For example, the court in *Irion v. State* held:

> "[t]hese [accident] reports were not collected or compiled by the State for the purpose of obtaining federal funds or to enforce safety. Historically, accident reports have been collected by the Department of Public Safety for many other purposes. Collection or compilation of such reports have far outdated the enactment of 23 USCA 409, although the Department of Transportation and Development may have used such accident reports as raw data or information to compile other reports. That fact, in and of itself, does not make the underlying facts inadmissible simply because they are later recorded by the Department of Transportation and Development. Furthermore, if the court were to adopt the interpretation which the State proposes, then no accident report could ever be admitted in any case, regardless of whether or not the State is a party. Clearly, this is not the intent of the statute. The federal statute must be construed restrictively to prohibit only the information that is expressly stated therein."

Irion, 760 So.2d 1220, 1226 (La. App. 2000).[6]

Although Congress altered the language of § 409 in the 1995 amendment, it did not expand the statute's original scope. Instead, Congress clarified that even raw data, when collected or compiled for the purpose of § 152, was protected. Employing the doctrine of *noscitur a sociis*, Congress intended to protect only data or reports compiled or collected *for the purpose of engaging in activity pursuant to § 152*.

Moreover, Congress reinforced the core purpose of the statute. As Congress stated in its legislative history, "[i]t is intended that raw data collected prior to being made part of any formal or bound report" becomes privileged. Pet., App. A at 55 *citing* H.R. Rep. 104-246 § 328 at 59. Congress did not say *all* raw data, e.g., police records, accident reports, etc., become privileged. Congress only said *collected* raw data become privileged. In doing so, it recognized the significance of "collecting" data. Much as attorney work product is immune from discovery because it reflects the mental impressions of those who generated it, Congress created a privilege for raw data collected for § 152 purposes because the data reflect the mental impressions, specifically the concerns over dangerous roadway conditions, of the government employees collecting it. Such a rule makes perfect sense: mental

---

[6] *See also Dep't of Transp. v. The Superior Court of Solano County*, 47 Cal. App. 4th 852, 855 n.2 (Cal. App. 1996) (stating the 1995 amendment to Section 409 "did not eliminate the express requirement that the information at issue have been compiled or collected *pursuant to section 152*" (emphasis in original)).

impressions traditionally enjoy privilege or immunity. Facts do not. Much as the courts hold litigants are entitled to discover raw facts that have not been "processed" by an attorney into work product, Congress left intact a litigant's right to discover raw data that have not been "processed" by a government employee for purposes of § 152. Thus, when raw data are collected for purposes of § 152, they are protected. However, when that same raw data are collected as part of regular state requirements, they are not. What exact distinction was made by the Alabama Supreme Court in *Ex parte Alabama Dep't of Transp.*, 757 So.2d at 371, and the Louisiana Supreme Court in *Irion*, 760 So.2d at 1220, discussed earlier.

The Washington Supreme Court found the 1995 amendment to § 409 unconstitutional because it failed to properly recognize the scope of the Act as did the Alabama Supreme Court. This Court, however, avoids constitutional issues unless the plain statement of Congress requires otherwise. *See Gregory*, 501 U.S. at 461. The plain statement of Congress in the 1995 amendment to § 409 comports with the most basic concepts of discovery and privilege in the American justice system. Congress simply never stated it intended to preclude the use of information that would otherwise be gathered simply because it was later used for an application under § 152. The Washington Supreme Court's factual predicate is incorrect and its constitutional decision unnecessary. For that reason, even if this Court grants certiorari, it would not address the constitutional issues. Accordingly, no important federal question is raised.

C. The Washington Supreme Court's decision, instead of conflicting with relevant decisions of this Court, follows them.

The Washington Supreme Court's decision correctly followed relevant decisions of this Court. If, indeed, § 409 is interpreted to preclude the use in state courts of state gathered information regarding traffic accidents that would have been gathered regardless of § 152, then such an interpretation would lead to the conclusion that § 409 violated the Tenth Amendment. Such a ruling would be in accord with the recent decisions by this Court addressing state sovereignty.

"The Constitution creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552, 115 S. Ct. 1624, 131 L. Ed. 2d 616 (1995). The Tenth Amendment embodies this core principle:

> the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs [this Court] to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.

New York v. United States, 505 U.S. 144, 157, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992).

This Court has not hesitated to invalidate federal acts that intrude on state sovereignty. *See, e.g., United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) (invalidating civil remedy provision of Violence Against Women Act as exceeding commerce power); *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d

636 (1999) (holding Congress could not subject state to suit in state court under Fair Labor Standards Act without its consent); *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997) (holding that Freedom Restoration Act exceeded Congress' Fourteenth Amendment enforcement powers); *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 128 L. Ed. 2d 914 (1997) (holding that Congress could not require state officers to conduct background checks on prospective handgun purchasers under Brady Handgun Violence Prevention Act); *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) (holding that Congress lacked authority under Indian Commerce Clause to abrogate states' Eleventh Amendment immunity); *United States v. Lopez*, 514 U.S. at 549 (holding that Gun-Free School Zones Act exceeded Congress' power).

As an initial matter, the Washington Supreme Court held private citizens have standing to seek redress under the Tenth Amendment. As this Court has stated,

> [t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of *individuals*. State sovereignty is not just an end in itself. "Rather, federalism secures to *citizens* the liberties that derive from the diffusion of sovereign power."

New York v. United States, 505 U.S. at 181 (emphasis added) *quoting Coleman v. Thompson*, 502 U.S. 722, 759 (1991) (Blackmun, J., dissenting). This ruling is supported by numerous decisions. *See, e.g., Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1033, n. 6 (11th Cir. 1992); *Atlanta Gas Light Co. v. United States Dep't of Energy*, 666 F.2d 1359, 1369 n.16 (11th Cir. 1982); *Steward Machine Co. v. Davis*, 301 U.S. 548, 573, 57 S. Ct. 883, 81 L. Ed. 1279 (1937); *see also Dillard v. Baldwin County Commissioners*, 225 F.3d 1271, 1276-77 (11th Cir. 2000) (holding that, as long as a private plaintiff "suffered an injury in fact caused by the challenged action," he or she has standing to assert a Tenth Amendment claim); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 703-04 (7th Cir. 1999) (relying on *New York v. United States* in holding that private plaintiff suffering a concrete injury traceable to congressional action had standing to assert a Tenth Amendment claim).

The Washington Supreme Court, following precedent of this Court, held the 1995 amendment of § 409 violated the Tenth Amendment. It further held the respondents have standing to raise these issues under the Tenth Amendment.

If Congress violated the Tenth Amendment, then Guillen, as the party suffering an injury, has standing to seek redress.

1. Neither the Supremacy Clause nor the Necessary and Proper Clause are independent bases of constitutional authority.

Pierce County argues the Washington Supreme Court disregarded both the Supremacy Clause and the Necessary and Proper Clause. It fails, however, to understand that neither provision is an independent basis of constitutional authority.

First, "the Supremacy Clause enshrines as 'the supreme Law of the Land' only those federal Acts that accord with the constitutional design. Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power." *Alden v. Maine*, 527 U.S. at 731 (citation omitted). Pierce County must establish a basis for its Supremacy Clause argument by showing some independent constitutional power properly authorized by Congress. As discussed below, it cannot.

Second, the Necessary and Proper Clause, "the last, best hope of those who defend ultra vires congressional action," *Printz*, 521 U.S. at 923, likewise presents no independent basis of constitutional authority. "When a 'La[w] . . . for carrying into Execution' " an enumerated power "violates the principle of state sovereignty reflected in the various" enumerated powers "it is not a 'La[w] . . . *proper* for carrying into Execution' " an enumerated power "and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.' " *Id.* at 923-24 (citations omitted, alterations in original). Again, Pierce County must establish a basis for its Necessary and Proper Clause argument

by showing some independent constitutional power properly authorized by Congress. It cannot.

2. The federal government does not have an interest in prohibiting the use of state gathered information under state law in state courts in carrying out the purpose of § 152 and thus did not have authority under the Spending Clause to effect such a result.

Under the Spending Clause, Congress has broad authority to provide for the general welfare. *See South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987). This Court has recognized that Congress may employ its power to further policy objectives by conditioning receipt of federal moneys on compliance by the recipient with federal statutory and administrative directives. *Id.* Notwithstanding these broad powers, Congress violates the Constitution if its conditions are not relevant and reasonably related to a valid federal interest in a specific national project or program. *Id.* at 207-08.

Pierce County has not explained what federal interest would be served if any court were to adopt its reasoning. There is no dispute that the federal government has an interest in safe roads. There is no dispute that the federal government can impose valid conditions upon its grant of funds to states for road improvements. There is no dispute that states, albeit in a short-sighted manner, may be of the opinion that they would rather forego federal funds for road improvements if data they gathered for no other reason than to determine which roads needed improving were discoverable for tort litigation. That

information is protected by the Washington Supreme Court's decision. However, there should also be no dispute that the discovery of traffic accident information that the state has historically kept and which its own laws require it to keep regardless of § 152 opportunities, has no effect whatsoever upon the state seeking federal funds. In other words, keeping from the jury the fact that the state compiled and collected accident information regarding a certain intersection for purposes of seeking federal funds is appropriate. It is appropriate because if a party in a tort action is allowed to admit into evidence that the state was gathering information about a certain intersection then a jury could reach an inference that the state admitted that the intersection was dangerous. This was the danger in which the federal government has an interest. However, the federal government does not have an interest in keeping a tort plaintiff from using raw data about a traffic intersection that is kept as a matter of course under state law. There, the discovery and use of that information will not have an impact upon a state's decision to seek federal funding.

The Washington Supreme Court interpreted § 409 to reach data that would have no bearing on a state's decision to seek § 152 funds. Under that statutory construction, it was correct in ruling that the federal government did not have authority under the spending clause to enact such a condition.

3. The challenged provisions are not an integral part of the regulatory program and thus Congress did not have authority under the Commerce Clause to prohibit raw traffic data from being introduced into evidence in state court proceedings.

Under the Commerce Clause, Congress may regulate three categories of activity: channels of interstate commerce, instrumentalities of interstate commerce, and activities that "substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. Regardless of the activity regulated, where a "complex regulatory program" contains multiple components, a challenged component must be "an integral part of the . . . program" to survive Commerce Clause scrutiny. *Hodel v. Indiana*, 452 U.S. 314, 329 n.17, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981).

Here, as discussed above, if § 409 prohibits the discovery and admissibility of raw traffic and accident data that would have been collected and compiled by the state regardless of federal funding opportunities, then such a provision would not be an integral part of the purpose of § 152. The Washington Supreme Court was correct in its holding:

> However, we fail to see how those vital federal purposes are reasonably served by also barring the discovery and admissibility in state court of routinely prepared state and local traffic and accident materials and data that would exist even had a federal safety enhancement program never been created, such as collision photographs, traffic counts, citizen complaint letters, and "raw data" relating to the history of a local traffic intersection. Such a broad privilege lacks the requisite nexus to § 409's raison d'etre and cannot be reasonably characterized as an "integral part" of the Federal-aid highway system's regulation.

Pet., App. A at 106.

4. If Congress had intended the scope of § 409 to be as broad as Pierce County is urging, then it could not be authorized under the Necessary and Proper Clause.

As noted above, if § 409 is given the expansive reach Pierce County is urging, then such a reach is neither necessary nor reasonable to effect the purposes of federal funding for highway safety. *See Printz*, 521 U.S. at 898.

Because an expansive reading of the 1995 amendment to § 409 cannot be justified under the Spending, Commerce, or Necessary and Proper Clauses of the Constitution, the Washington Supreme Court was correct in its ruling that the amendment violated the Tenth Amendment.

CONCLUSION

This Court lacks jurisdiction to hear this dispute at this time. Pierce County made the decision to seek interlocutory appeal from the trial court's decision instead of allowing the matter to proceed in the regular course. It did so despite the fact that all of its rights would have been preserved had it allowed the appeal to follow its normal course. It failed to do so.

Even if this Court has jurisdiction it should not accept certiorari because of the inherent problems with hearing an interlocutory appeal.

Finally, even if this Court decides that the interlocutory nature of this appeal does not preclude it from hearing the matter, Pierce County has failed to demonstrate a compelling reason for this Court accepting certiorari. It has not demonstrated that the Washington Supreme Court's opinion conflicts with any other state supreme court's ruling on the constitutionality of the 1995 amendment. It has not demonstrated that the Washington Supreme Court has decided an important federal question. And it has not demonstrated that the Washington Supreme Court has failed to follow relevant decisions of this Court.

Perhaps most importantly, Pierce County has not articulated how the Washington Supreme Court's decision has in any way compromised the goals of § 409. Pierce County has identified those goals as the following. First, not giving private plaintiffs an added advantage in their efforts to prove negligent government design or maintenance of certain traffic sites. Petition at 18. Second, prohibiting federally required record-keeping from being used as a tool in private litigation. Petition at 19. Here, those goals are still being accomplished. The Washington Supreme Court had a very narrow holding: it upheld the validity of § 409 except to the extent that it precluded a plaintiff from seeking raw data that the state would be keeping regardless of whether federal funding opportunities existed. This decision is consistent with other jurisdictions and consistent with sound public policy.

For these reasons, this Court should deny Pierce County's petition.

Respectfully submitted,

SALVADOR A. MUNGIA
WSBA #14807
Counsel of Record
DARRELL L. COCHRAN
WSBA #22851
J. BRADLEY BUCKHALTER
WSBA #29295
1201 Pacific Avenue
Suite 2200
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

Counsel for Respondents

(9)

No. 01-1229

Supreme Court, U.S.
FILED
APR 8 2002
CLERK

IN THE

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GJUILLEN,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

---

PETITIONER'S REPLY BRIEF

GERALD A. HORNE
Prosecuting Attorney
DANIEL R. HAMILTON *
and SUSAN P. JENSEN
Deputy Prosecuting Attorneys
955 Tacoma Avenue South
Suite 301
Tacoma, WA 98402
(253) 798-7746

* Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

2418

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ANALYSIS	1
I. JURISDICTION EXISTS TO GRANT CERTIORARI	1
II. THIS CASE MERITS REVIEW	5

TABLE OF AUTHORITIES

CASES

	Page
Alden v. Main, 527 U.S. 706, 752 (1999)	10
City of Atlanta v. Watson, 267 Ga. 185, 475 S.E.2d 896, 903-4 (1996)	6
Coniker v. New York, 181 Misc. 2d 801, 695 N.Y.S.2d 492, 495 (N.Y. Ct. Cl. 1999)	6
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479 (1975)	3, 4
Ex parte Alabama Dep't of Transp., 757 So. 2d 371 (Ala. 1999)	7, 8
Fry v. So. Pacific Trans. Co., 715 So.2d 632 (La. App. 1998)	6
Gaubert v. Denton, 1999 WL 350103 (E.D.La. May 28, 1999), *aff'd* 210 F.3d 368 (5th Cir. 2000)	6
Gillespie v. United States Steel Corp. 379 U.S. 148, 152 (1964)	2
Guillen v. Pierce County, 144 Wn.2d 696, 31 P.3d 628, 645 (2001)	*passim*
Guillen v. Pierce County, 96 Wn.App. 862, 982 P.2d 123 (1999)	2
Helstoski v. Meanor, 442 U.S. 500, 507-8 (1979)	3
Irion v. State, 760 So.2d 1220 (La. App. 2000)	8
John Doe Agency v. John Doe Corp., 493 U.S. 146, 155 (1989)	9
Lusby v. Union Pacific R.R. Co., 4 F.3d 639, 641 (8th Cir. 1993)	7
Mackie v. Grand Trunk Western R. Co., 544 N.W.2d 709, 711 (Mich. App. 1996)	6
Mercantile National Bank v. Landeau, 371 U.S. 555, 557-58 (1963)	5
New York v. United States, 505 U.S. 144, 178-79 (1992)	10

TABLE OF AUTHORITIES—Continued

	Page
North Dakota v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973)	4
Palacios v. Louisiana and Delta Railroad, 775 So.2d 698 (La.App. 2000)	6
Pennsylvania v. Ritchie, 480 U.S. 39 (1987)	4
Printz v. United States, 521 U.S. 898, 935 (1997)	10
Reichert v. State, 694 So.2d 193 (La. 1997)	7
Robertson v. Union Pacific R. Co., 954 F.2d 1433, 1435 n. 3 (8th Cir. 1992)	7
Seaton v. Johnson, 898 S.W.2d 232, 235-37 (Tenn. App. 1995)	6
Tennesse Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 144 (1939)	9-10
United States v. McDonald, 435 U.S. 850, 860 (1978)	5
Walden v.Dept. of Transp., 27 P. 3d 297 (Alaska 2001)	7

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. III, Sec. 2	4

STATUTES

23 U.S.C. § 409	*passim*
28 U.S.C. § 1257	2

MISCELLANEOUS

R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* §§ 3.3, 3.4(7th ed. 1993)	2, 3, 5

OTHER AUTHORITIES

Act of November 19, 1995, Pub. No. 104-59, 1995 U.S. C.C.A.N. (109 Stat.) 591	8

INTRODUCTION

Respondents "Counter Statement" often actually is a "Statement Counter" to the record. For example, they claim that only in response to their public disclosure suit did petitioner "disclose[] all but five of the requested twenty documents," but they do not provide *any* supporting record citation because the record is otherwise. Br. In Opp. 1 n. 1. *See* CP 139-45, 76. Respondents even misstate the basic legal issue decided by the state supreme court and claim it held Congress could not constitutionally protect "data *collected and compiled* under *required state law*. . . ." Br. In Opp. 5 (emphasis added). However, there is no state law that required *Pierce County* to "*collect and compile*" the *State* Patrol or other accident reports involved here. *See* App. "K" at 4-5. Rather, even *Guillen* concedes the evidence established "counties are required to . . . collect data, reports and studies *so as to* determine whether a particular roadway is an appropriate candidate for *funding under 23 U.S.C. § 152*." *Guillen v. Pierce County*, 144 Wn.2d 696, 31 P.2d 628, 645 (2001) (emphasis added). From the beginning respondents have *expressly* sought accident history documents "used in the preparation" of such applications for federal "*safety construction improvement project[s]* . . . ." *Id.* at 633.

ANALYSIS

I. JURISDICTION EXISTS TO GRANT CERTIORARI

Respondents' jurisdictional arguments disregard that they brought *two* civil actions in state court. The first was an action for disclosure under Washington's Public Disclosure Act (hereinafter "PDA"). *See* 31 P.3d at 634. The second was a "separate tort action" in which a broader set of documents were sought in discovery. *Id.* at 634-35; App. "K." The Washington Supreme Court's decision on the section 409 privilege is final as to both cases.

The decision in the *Guillen* PDA case is ripe for review and will be dispositive of both that case and of the federal issue in the companion tort case. The *Guillen* court vacated the PDA trial court's ruling that all five of the controversial documents be produced and, at the same time, ordered the court to conduct further proceedings "not inconsistent with this opinion." 31 P.3d at 656. Given that the County's sole defense for withholding the documents, 23 U.S.C. § 409, has now been declared unconstitutional, the PDA trial court has no discretion but to order production of the four documents found unprivileged. The fifth document was found privileged below and that holding was not appealed. *See Guillen v. Pierce County*, 96 Wn.App. 862, 982 P.2d 123 (1999); 31 P.3d at 634 n.1. Hence, *Guillen*'s reference to "all of the disputed items" refers instead to the *Guillen* and consolidated *Whitmer tort* cases. *See* 31 P.3rd at 635-37. The four PDA documents are accident reports or lists of accident reports that the court has specifically identified as "raw data" subject to disclosure. 31 P.3d at 655. Even respondents assert all that is left is entry of a final judgment so that the County can pursue its appeal once more. Br. In Opp. 9. In fact, all that remains in the PDA case is for the trial court to decide the *amount* of attorneys fees already ordered by the supreme court to punish the County for having asserted the § 409 privilege. 31 P.3d at 655-56. Were production of the documents still in question the state court would not have ordered attorney's fees in the PDA case.

This Court, when interpreting finality, under 28 U.S.C. § 1257, will look not just at the technical posture of the case, but at the totality of circumstances; appealability is not limited to the "last order possible to be made in a case." R. Stern, E. Gress-Man, S. Shapiro & K. Geller, *Supreme Court Practice* §§ 3.3, 3.4 (7th ed. 1993), (*citing, Gillespie v. United States Steel Corp.* 379 U.S. 148, 152 (1964)). This case, where the vacation and remand cannot affect the ruling on the federal question, fits the first exception to the finality

rule set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975):

> [C]ases in which there are further proceedings–even entire trials—yet to occur in the state courts but for one reason or another the federal issue is preclusive or the outcome preordained. In these circumstances, because the case is for all practical circumstances concluded, the judgment of the state court on the federal issue is deemed final.

The *Guillen* PDA case therefore is ripe for review of the important federal question it presents.

Respondents however ignore the *Guillen* PDA appeal and argue the interlocutory review in the *tort action* and continued failure to produce documents precludes finality. Br. In Opp. 6. This argument overlooks that there has been no "interlocutory" appeal in the PDA case and suggests, without precedent, that a party invoking privilege in a tort case must produce the privileged documents before seeking review. Hence, under respondents' view this Court cannot review a state court order to produce materials protected by a federal privilege—whether it be § 409 or federal executive, military secrets or national security privileges—until litigation on the merits is final. To the contrary, this Court holds a decision abrogating immunity is a "final decision" for purposes of review even if it is technically interlocutory in nature. *Helstoski v. Meanor*, 442 U.S. 500, 507-8 (1979). The force behind this court's pragmatic approach to the finality rule is the desire of the Court to preserve for appeal issues of important federal concern. *Supreme Court Practice, supra*. § 3.4. *Cox, supra*, for instance, found an issue of

freedom of the press was ripe even though the damages trial had yet to be held. 420 U.S. 486.[1]

Here the *Guillen* tort appeal also represents such an important federal concern that is worthy of review and merits the Court's established practical approach to finality. The public interest at issue is highway safety. The importance of the funding sources and the necessity for candor in applying for such funds has been set forth in detail in the County's Petition and the *amicus curiae* briefs filed in this matter. Even a party to a separate tort action who has settled its case, Whitmer, has attempted[2] to file a brief in this matter underscoring the importance of the federal question. The *Guillen* tort action is the rare case where a state court has declared unconstitutional an act of Congress even in light of all other jurisdictions conceding its preemptive effect. 31 P.3d at 644. Most telling is that the state supreme court itself has invited review. *Id.* at 655.

While the decision of this Court in the PDA case will be dispositive of the discovery issue in the tort case, it is also true that the tort case *alone* would be eligible for review under to the cases interpreting the finality rule. Of concern in the decision in *Cox, supra*, was that if appeal were to abide the trial on the merits, petitioner might prevail on non-federal grounds and the important freedom of the press issue could not reach the Supreme Court. 420 U.S. at 484-6. The *Guillen*

[1] *See also, Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (preserving the right to exculpatory evidence); *North Dakota v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973) (concerning due process rights in a business licensure matter).

[2] Whitmers were parties to *Whitmer v. Pierce County* but not to this case of *Guillen v. Pierce County* and are not entitled to file documents under Rule 12.6, they admit their case was settled, dismissed and "moot," Whitmer Br. 10, and as a matter of law they have no "case or controversy" in which to have standing or for this court to decide. U.S. Const. Art. III, Sec. 2. Their brief should be stricken.

tort case presents the same problem. The facts of the accident are such that the County may well prevail at trial even if the privileged documents are admitted. In that event, and were the PDA case not subject to appeal, the decision of the Washington Supreme Court that 23 USC § 409 is unconstitutional would stand unchallenged to the detriment of the traveling public, the confusion of the many governments responsible for administering road programs and the undermining of numerous other similar federal privileges. See Louisiana Amicus Br. 14-16. The vital public interest can only be served by granting review of the final decision on the federal question which is separate and apart from any other proceedings in the case. *See, e.g., Mercantile National Bank v. Landeau*, 371 U.S. 555, 557-58 (1963)(interpretation of federal statute was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action.") *See also Supreme Court Practice, supra.* § 3.8 (discussing collateral order rule and *citing United States v. McDonald*, 435 U.S. 850, 860 (1978)).

Finally, in support of the strong policy reason for accepting review, this Court should consider the County's earlier recitation of authorities that irreparable harm is inherent where a lower court has held a statute to be unconstitutional. *See* App. to Stay Mandate, 8-11. This principle is uncontroverted as respondents did not oppose the application for stay nor do they distinguish it now. Indeed, presumably such was one of the grounds for this Court's stay of the state court mandate. *See* 1/02/02 Order #01A452.

II. THIS CASE MERITS REVIEW

Respondents next claim *Guillen*'s holding—i.e. that §409 is unconstitutional and "only materials and data *originally created* for the statutory identified federal purposes are lawfully covered by the federal privilege," *see* 31 P.3d at 633

(emphasis added)—supposedly "does not conflict with the decisions of other courts of last resort." Br. In Opp. 12-14. Respondents however choose to consider only the supposed "three other state courts of last resort" that they claim "have considered the *1995* amendment *as it relates to public roads*." Br. In Opp. 12-14 (emphasis added). First, respondents fail to explain why a proper analysis would *exclude* both the numerous *contrary decisions* that *have* "considered the 1995 amendment as it relates to public roads" *at railroad crossings* or other locations,[3] *and* the majority of *contrary decisions* that even without need of the 1995 "clarification" amendment *already held* § 409 applied to preexisting data originally created for another purpose.[4] Second, *none* of even

[3] *See e.g. Palacios v. Louisiana and Delta Railroad*, 775 So.2d 698 (La.App. 2000)(accident history protected because "Congress' intrusion, in this instance, however, is constitutionally permissible . . .); *Coniker v. New York*, 181 Misc. 2d 801, 695 N.Y.S.2d 492, 495 (N.Y. Ct. Cl. 1999)("Congress has determined that the effect of the prohibition . . . outweighs the barriers that it creates for litigants attempting to prove that a state's negligence contributed to their injuries. . . . ."); *Gaubert v. Denton*, 1999 WL 350103 (E.D.La. May 28, 1999) *aff'd* 210 F.3d 368 (5th Cir. 2000)("[e]very court that has considered the privilege, both federal and state, has concluded that it serves the legitimate purpose of fostering the collection and evaluation of highway safety information free from the threat of future tort actions.")(*quoted in Palacios*, 775 So.2d at 701)); *Fry v. So. Pacific Trans. Co.*, 715 So.2d 632 (La. App. 1998)(accident report excluded because 1995 amendment "clarified that the list of exhibits to be excluded should also encompass accident reports. . . ."); *Mackie v. Grand Trunk Western R. Co.*, 544 N.W.2d 709, 711 (Mich. App. 1996)("a document that otherwise falls within the ambit of §409 must be considered inadmissible *even though it fulfills a state as well as a federal function.*")(emphasis added); *City of Atlanta v. Watson*, 267 Ga. 185, 475 S.E.2d 896, 903-4 (1996)("409 is applicable in state court" because "[t]o hold otherwise defeats a significant purpose of the federal act and cannot be justified in light of the supremacy clause.")

[4] *See e.g. Seaton v. Johnson*, 898 S.W.2d 232, 235-37 (Tenn. App. 1995)(before the 1995 amendment accident reports protected by the "clear weight of authority" under §409 because "all records *used or usable* in

respondent's three selected cases support *Guillen*'s holding and two are in direct conflict with it. *Walden v. Dept. of Transp.*, 27 P. 3d 297 (Alaska 2001) does not address the issue, respondents admit *Ex parte Alabama Dep't of Transp.*, 757 So. 2d 371 (Ala. 1999) actually holds "plaintiff was not entitled to obtain information regarding prior auto accidents" from the state entity that collected and compiled it—and did so by expressly holding contrary state law was preempted because otherwise it would stand "as an obstacle to the accomplishment of the full purposes and objectives of Congress," *id.* at 374, and *Reichert v. State*, 694 So.2d 193 (La. 1997), also found the statute applied to documents not created for federal purposes because in "1995 section 409 was amended . . . to effectively *eliminate the admissibility* of '*[a]ccident* reports, traffic counts, and *other raw data collected* by the Department.'"

Respondents next make an even stranger argument that *Guillen*—which explains its split from these universally contrary cases by holding "Congress' 1995 amendment to 23 U.S.C. § 409 violates the United States Constitution's federalist design," *see* 31 P.3d at 633—somehow "did not decide an important federal question." Br. In Opp. 15. Respondents remarkably go on to argue certiorari should *not* be granted and *Guillen not* reviewed because it *wrongly holds* the 1995 amendment applies to "raw data . . . collected as part

identifying, evaluating or planning safety of highway *or* rail-highway crossings pursuant to Sections 130, 144, and 152 are so immune to examination.")(emphasis added); *Lusby v. Union Pacific R.R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993)(data from accident reports excluded because "*state materials* do *not* fall outside the scope of §409 merely because they *are not compiled solely for federal reporting purposes and are available for other uses.*")(emphasis added); *Robertson v. Union Pacific R. Co.*, 954 F.2d 1433, 1435 n. 3 (8th Cir. 1992)("[a]lthough such information [such as newspaper and traffic count] was *available for other uses and purposes*, the statute's mandatory language *requires exclusion* . . . .")(emphasis added).

of regular state requirements . . . ." Br. In Opp. 19. Ignoring both that the state court never claimed there were "regular state requirements" that *the County* "collect" such raw data and that Congress expressly stated the 1995 amendment was a "clarification" to ensure "*raw* data collected *prior* to being made part of any formal or bound report" was protected, Act of November 19, 1995, Pub. No. 104-59, 1995 U.S. C.C.A.N. (109 Stat.) 591, respondents nowhere explain how *Guillen*'s interpretation of a *federal* statute [5] is not a "*federal* question." This is especially so where the basis for its "interpretation" is its holding that the latest amendment is unconstitutional.

Respondents find *Guillan*'s striking constriction of Congress' constitutional powers so hard to defend that they would prefer that if certiorari was granted the Court "not address the constitutional issues." Br. In Opp. 19. However such assumes this Court would agree there is no need to vacate *Guillen*'s erroneous constitutional analysis or to affirm the constitutionality of a federal statute. Such also assumes this Court would agree with respondents and against *Guillen* that Congress did not really mean what it expressly said in the text and legislative history of § 409, would agree the numerous state and federal cases which unlike *Guillen* protect raw data are all wrong, and would agree to give § 409 an interpretation that *discourages*—rather than *encourages* as Congress intended—states and municipalities from participating in the federal hazard elimination program. If § 409 no longer constitutionally protects raw data as *Guillen* holds then Pierce

[5] As to its holding that the 1995 amendment *intended* to protect raw data, but only in *that* regard, *Guillen was* consistant with every court having decided the question. *See supra* notes 1 & 2. Though respondent asserts *Ex parte Alabama Dep't of Transp.* and *Irion v. State*, 760 So.2d 1120, (La. App. 2000) are at least *some* authority to the contrary, Br. In Opp. 17-18, the former instead *upheld* the exclusion of raw data while the latter simply held the raw data there had "not been collected or compiled by the State for the purpose of obtaining federal funds or to enforce safety" and was "acquired . . . *from a third party*, not DOTD."

County and other municipalities are in a far worse position in litigation by having their Public Works Department being a central location for *all* accident history from all law enforcement such as the unaffiliated State patrol—providing plaintiffs a "one stop shopping" for all their discovery needs—and in a position for plaintiffs to claim the government "knew" of the accident history because it "collected and compiled" it pursuant to federal law. Indeed, respondents surprisingly *agree* "the federal government has an interest" if "a party in a tort action is allowed to admit into evidence that the state was gathering information about a certain intersection," Br. In Opp. 25, and the record is uncontested such is *exactly* why respondents and others argued to the state court they wanted these documents. *See* P's Memo. In Supp. Of Mot. To Compel 14 ("Obviously, . . . plaintiffs are trying to establish that the County had notice of this hazardous condition and failed to make improvements."); Whitmer Br. at 4 (seeking "to prove that the County knew or should have known of the particular hazards.") *See also Alaska, et al.* Amicus Br. at 4-5.

Such "federal question[s]" are so important 13 states, municipalities from across the nation and the railroad industry all support the grant of certiorari. *See amici* briefs. Indeed, even the state court recognized "[i]f this state court has misconstrued the United States Constitution's limitations upon the federal government's power . . . the United States Supreme Court will so instruct . . . ." 31 P.3d at 655. The requirements of Rule 10 are clearly met.

Finally, respondents claim *Guillen* simply "followed relevant decisions of this Court." Br. In Opp. 20. However, respondents ignore such cited "decisions" as *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155 (1989) ("[d]ocuments having been compiled once for [one] purpose . . . were not disqualified from being 'compiled' again later for a different purpose.") and *Tennesse Electric Power Co. v.*

Tennessee Valley Authority, 306 U.S. 118, 144 (1939) ("absent the states or their officers, [individuals] have no standing . . . to raise any question under the [tenth] amendment.") Similarly, respondents nowhere address the Court's statements that "federal 'direction' of *state judges* is mandated by *the text of the Supremacy Clause*," *New York v. United States*, 505 U.S. 144, 178-79 (1992) (emphasis added), and that Congress "may require *state courts* . . . 'to enforce federal prescriptions, insofar as those prescriptions relate[] to matters appropriate for the judicial power." *Alden v. Main*, 527 U.S. 706, 752 (1999); *Printz v. United States*, 521 U.S. 898, 935 (1997). To the extent respondents do discuss the issues of "federal interest" and the Spending, Commerce and Necessary and Proper Clauses, they merely repeat *Guillen's* attempted justifications that were addressed in the petition and *amici* briefs. Pet. 13-27; AAR *Amicus* Br. 11-19; *Louisiana Amicus* Br. 14-17; *Alaska et al Amicus* Br. 1-8.

Respectfully submitted,

GERALD A. HORNE
Prosecuting Attorney
DANIEL R. HAMILTON *
and SUSAN P. JENSEN
Deputy Prosecuting Attorney
955 Tacoma Avenue South
Suite 301
Tacoma, WA 98402
(253) 798-7746

Attorneys for Petitioner

* Counsel of Record

April 8, 2002

APPENDIX

APPENDIX

APPENDIX K

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

No. 98 2 06119 2

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,

Plaintiffs,

vs.

PIERCE COUNTY, a municipal corporation, and THE ESTATE OF CLEMENTINA GUILLEN-ALEJANDRE,

Defendants.

Plaintiffs' First Set Of Interrogatories And Request For Production Of Documents To Defendant Pierce County and Answers Thereto

---

TO: DEFENDANT PIERCE COUNTY

AND TO: ITS ATTORNEY

DEFINITIONS AND PROCEDURES

A. Procedures: Plaintiffs propound the following interrogatories pursuant to CR 33, and you must file answers within thirty (30) days of service. Please complete the answers within the space provided and, if needed, add additional pages. Return the signed and verified original to this office. These interrogatories are continuing in nature. If

you discover information as this matter progresses then you are requested to supplement your responses to ensure that they are accurate at the time of trial and so that additional discovery can be conducted based upon your supplemented responses.

Plaintiffs are propounding the request for production of documents pursuant to Civil Rule 34 and requests that you provide a copy of the documents responsive to the requests within thirty days of receiving these requests to the offices of Gordon, Thomas, Honewell, Malanca, Peterson & Daheim, Suite 2200, Wells Fargo Plaza, Tacoma, Washington, 98402.

B. Scope of Answers: (1) Use of the pronoun "you" refers to Defendant Pierce County and it is intended that the answers include all information known to the persons to whom the interrogatories are directed, their attorneys and investigators; and (2) the term "intersection at issue" refers to the intersection at 168th Street East and B Street East that is the subject of this lawsuit.

C. Document: As used herein the word "document" shall mean the original and any copy, regardless of origin or location, of any letter, memorandum, hand-written or typed note, record, report, working paper, graph, chart, index, data sheet or data processing card, map, drawing, book, periodical, pamphlet, audio recordings, audio and video tapes, information stored on computer discs or hard drives; photograph or any other written, recorded or transcribed, punched, taped, filmed, photographic or graphic matter, however produced or reproduced, to which you have or have had access.

D. Supplemental Answers: These interrogatories and requests for production shall be deemed to be continuing, and in the event you discover further information that is responsive, you are required to supplement your answers and responses.

INTERROGATORY NO. 1: Identify each person providing information used to answer these interrogatories together with the specific interrogatory to which information was provided.

ANSWER:

Dan Hamilton: Interrogatory nos. 1-8;
Susan Jensen: Interrogatory nos. 1, 3-8;
Craig Adams: Interrogatory nos. 1, 5; and
Tom Ballard: Interrogatory nos. 1, 3-4, 6, 8-9.

INTERROGATORY NO. 2: For each expert witness that you intend to call at time of trial provide the following:

(a) Name, address, and field of expertise for each such expert;
(b) The subject matter on which the expert is expected to testify;
(c) State the substance of the facts and opinions to which the expert is expected to testify; and
(d) Provide a summary of the grounds for each such opinion.

ANSWER: Defendant Pierce County has yet to determine its experts and this interrogatory will be supplemented pursuant to the case schedule in this action.

INTERROGATORY NO. 3: Identify all employees, agents, or officials of defendant Pierce County who have knowledge of automobile accidents taking place at the intersection at issue for the time period January 1, 1990 through July 4, 1996. This interrogatory includes knowledge gained by first hand investigation, such as law enforcement officers investigating an accident, or knowledge gained indirectly such as reading reports or other documents. Please specify by each the name of each individual how they gained their knowledge, i.e., whether through first hand observance or by way of second-hand information.

ANSWER: Objection on the ground Interrogatory No. 3 is overbroad, unduly burdensome and violates the work-product privilege as well as 23 U.S.C. Sec. 409.

INTERROGATORY NO. 4: Identify all persons within Pierce County's knowledge who have been involved in automobile accidents at the intersection at issue for the time period of January 1, 1990 through July 5, 1996.

ANSWER: Objection; this interrogatory seeks information protected by 23 U.S.C. Sec. 409.

INTERROGATORY NO. 5: Identify all Pierce County Deputy Sheriffs who patroled the intersection at issue during the time frame of January 1, 1990 through July 4, 1996.

ANSWER: Objection; this interrogaory is unduly burdensome, overbroad and violates 23 U.S.C. Sec. 409.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 1: Provide a copy of all 911 documents (including all tape recordings and computer stored information) or phone calls taken from a two block radius of the intersection at issue for the time frame of January 1, 1990 through July 4, 1996. If you are able to provide documents only pertaining to accidents involving at least one automobile at the intersection at issue for this request then simply provide only those documents. However, if you are unable to segregate such documents, then provide all documents as originally specified.

RESPONSE: Objection; this request for production of documents is vague, overbroad, unduly burdensome and requests information protected by 23 U.S.C. Sec. 409. Without waiving those objections, tape recordings made by the Law Enforcement Support Agency are erased after six months unless specifically requested to be retained and Pierce County is unaware of any such request for any accident at the intersection in question. Computerized Accident logs are

destroyed after one year, and no record would be kept of the intersection in question because accidents along that road are normally investigated by the Washington State Patrol.

INTERROGATORY NO. 6: For each automobile accident occurring at the intersection at issue for the time period January 1, 1990 through July 5, 1996, provide the following:

(a) Date of the accident;
(b) Identify all persons involved in the accident;
(c) Identify all fatalities at each such accident.

ANSWER: Objection; this interrogatory seeks information protected by 23 U.S.C. Sec. 409.

INTERROGATORY NO. 7: Do you contend that any person not a party to this lawsuit is responsible for the accident at issue? If yes, identify each such individual and provide the factual basis for your assertion that each such individual is also responsible for this accident.

ANSWER: Unknown; this interrogatory will be supplemented upon completion of discovery if such information is obtained.

INTERROGATORY NO. 8: Are you contending that the two stop signs that Pierce County had in place at the time of this accident at the intersection at issue was a reasonably prudent traffic control device for this intersection? If yes, provide all bases for such an assertion.

ANSWER: Yes; no other control as required under the standards of the industry and good traffic control practice.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 2: Provide a copy of all documents reflecting all work done at the subject intersection for the time period of July 5, 1986 to July 4, 1996. This request includes, but is not limited to, all documents recording what work was done regarding all signage placed at the subject intersection, the dimensions of all signs, and the height all signs were placed.

RESPONSE: Objection to the extent this request seeks production of documents regarding accidents and evaluation of those accidents that are protected by 23 U.S.C. Sec. 409. Without waiving that objection, attached please find all maintenance records of the subject intersection in the County's possession from 1991 to July 1996. Records from 1986 to 1990 are no longer in the County's possession.

INTERROGATORY NO. 9: Specify the date Pierce County erected a four way stop at the intersection at issue and the date Pierce County erected a four way traffic light at the intersection at issue.

ANSWER: July 15, 1996 two additional stop signs were installed and on April 2, 1998 stop lights became operational.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 3: Provide a copy of all documents recording communications Pierce County has had with any other entity (whether an individual, government agency or official, or other association or group) regarding the intersection at issue for the time period of January 1, 1990 through July 4 1996.

RESPONSE: See objection to Interrogatory No. 6.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 4: Provide a copy of all photographs Pierce County has in its possession, control, or custody of accidents involving at least one automobile at the intersection at issue taken from January 1, 1990 through July 6, 1996.

RESPONSE: See objection to Interrogatory No. 6. The request also is outide the scope of discovery and seeks material privileged by the work-product privilege.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 5: Provide a copy of all written statements (this includes statements written by the witness themselves and statements where anther person wrote what the witness stated and the witness signed the statement) by witness to accidents at the

intersection at issue that occurred during the time period January 1, 1990 through July 6, 1996.

RESPONSE: See objection to Request for Production No. 4.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 6.: Provide a copy of all accident reports sent to Pierce County (whether directly or by way of another agency) from individuals who had been involved in automobile accidents at the intersection at issue from January 1, 1990 through July 4, 1996.

RESPONSE: See objection to Request for Production No. 4.

Dated this 8 day of April, 1998.

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM, P.L.L.C.

By /s/ Salvador A. Mungia
SALVADOR A. MUNGIA, WSBA No. 14807
Attorneys for Plaintiffs

Answers Submitted this _____ day of _____, 1999.

By: /s/ _____
Attorney for Pierce County

SIGNATURE

Deputy Prosecutor Daniel R. Hamilton, attorney for defendant Pierce County, states that the foregoing objections to interrogatory Nos. 3-6 are his.

DATED this 17th day of June, 1998.

/s/ Daniel R. Hamilton
DANIEL R. HAMILTON

STATE OF WASHINGTON)
ss:
County of Pierce)

DANIEL R. HAMILTON, being first duly sworn on oath, states as follows: That he is the attorney of record, and states that the answers to the foregoing Interrogatory Nos. 1, 2 and 7 are true to the best of his knowledge and belief.

/s/ Daniel R. Hamilton
DANIEL R. HAMILTON

SUBSCRIBED and SWORN to before me by Daniel R. Hamilton, this 17th day of June, 1998.

/s/ Marilyn P. Joval
(Type/Print Name) MARILYN P. JOYAL
NOTARY PUBLIC in and for the
State of Washington
Commission Expires: 06/13/01 .

STATE OF WASHINGTON)
ss:
County of Pierce)

TOM BALLARD being first duly sworn on oath, states as follows: That he is the County Engineer for Pierce County and states that the answers to the foregoing Interrogatory Nos. 3-4, 6, and 8-9 are true to the best of his knowledge and belief.

/s/ Tom Ballard
TOM BALLARD

SUBSCRIBED and SWORN to before me by Tom Ballard, this 17th day of June, 1998.

/s/ Don Hagen
(Type/Print Name) DON HAGEN
NOTARY PUBLIC in and for the
State of Washington
Commission Expires: 09/26/01 .

No. 01-1229 (10)

Supreme Court U.S.
FILED
JUN 24 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

PIERCE COUNTY, a municipal corporation,

Petitioner,

v.

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,

Respondents.

On Writ Of Certiorari To The State Supreme Court of Washington

JOINT APPENDIX

GERALD A. HORNE
Prosecuting Attorney
DANIEL R. HAMILTON*
SUSAN P. JENSEN
Deputy Posecuting Attorneys
955 Tacoma Avenue South
Suite 301
Tacoma, WA 98402
(253) 798-7746
(253) 798-6713 Fax

Counsel for Petitioner

THEODORE B. OLSON*
Solicitor General
Department of Justice
950 Pennyslvania Ave., N.W.
Washington, D.C. 20530
(202) 514-2217
(202) 514-8844 Fax

Counsel for the United States

SALVADOR A. MUNGIA*
DARRELL L. COCHRAN
J. BRADLEY BUCKHALTER
1201 Pacific Avenue
Suite 2200
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500
(253) 620-6565 Fax

Counsel for Respondents

Counsel of Record

Petition For Certiorari Filed February 22, 2002
Certiorari Granted April 29, 2002

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

91 Pgs

JOINT APPENDIX INDEX

I. Relevant Docket Entries..... 1

II. Relevant Pleadings..... 6

A. Complaint (Pierce County Superior Court Cause No. 96-2-13404-5)..... 6

B. Answer (Pierce County Superior Court Cause No. 96-2-13404-5)..... 10

C. Complaint (Pierce County Cause No. 98-2-06119-2)..... 13

D. Answer (Pierce County Superior Court Cause No. 98-2-06119-2)..... 17

II. Parts Of Record Parties Particularly Wish To Bring To Court's Attention..... 21

E. 6/26/97 Declaration of Thomas Ballard (Pierce County Superior Court Cause No. 96-2-13404-5) 21

F. 6/26/96 Declaration of Wayne Gruen (Pierce County Superior Court Cause No. 96-2-13404-5) 23

G. 7/14/97 Declaration of Darrel Cochran (Pierce County Superior Court Cause No. 96-2-13404-5) 26

H. 9/05/97 Supplemental Declaration of Thomas Ballard (Pierce County Superior Court Cause No. 96-2-13404-5)..... 79

I. 10/02/97 Third Declaration of Thomas Ballard (Pierce County Superior Court Cause No. 96-2-13404-5)..... 81

J. 9/29/98 Declaration of Juliana T. Kendall (Pierce County Superior Court Cause No. 98-2-06119-2)..... 85

JOINT APPENDIX INDEX – Continued

III. Judgment, Order Or Decision Under Review (See also Certiorari Appendix: "A"-"I." 87

K. 11/20/98 Order Denying Reconsideration (Pierce County Superior Court Cause No. 98-2-06119-2)..... 87

RELEVANT DOCKET ENTRIES

A. Pierce County Superior Court for State of Washington Cause No. 96-2-13404-5

12/09/96	Plaintiff's Complaint
01/10/97	Pierce County Answer
06/26/97	Motion for Summary Judgment with attachments:
	A. Declaration of Thomas Ballard
	B. Declaration of Daniel Hamilton
	C. Pierce County's Amended Answer to Plaintiff's Interrogatory No. 1
	D. Declaration of Wayne Gruen
07/14/97	Brief in Opposition to Motion for Summary Judgment and Cross Motion for Summary Judgment
07/14/97	Declaration of Darrell Cochran in Opposition to Summary Judgment
09/05/97	Pierce County's Rebuttal Brief with attached Supplemental Declaration of Thomas Ballard
09/05/97	Declaration of Susan Jensen Regarding Authenticity of Documents for *In Camera* Review
10/02/97	Pierce County's Motion for Reconsideration
10/02/97	Third Declaration of Thomas Ballard
10/08/97	Brief in Opposition
10/10/97	Order Denying Motion for Reconsideration
10/31/97	Verbatim Report of Proceedings (09/12/97)

11/05/97	Order Denying Motion for Summary Judgment and Granting Plaintiff's Cross Motion for Summary Judgment

B. Pierce County Superior Court for State of Washington Cause No. 98-2-06119-2

04/10/98	Plaintiff's Complaint
05/13/98	Pierce County's Answer
09/29/98	Plaintiff's Motion to Compel Discovery
09/29/98	Plaintiff's Memorandum in Support of Motion to Compel Discovery
09/29/98	Declaration of Juliana T. Kendall in Support of Motion to Compel Discovery
10/08/98	Pierce County's Motion For Protective Order
10/08/98	Memorandum in Support of Pierce County's Motion for a Protective Order
10/08/98	Affidavit of Daniel R. Hamilton in Support of Protective Order
10/16/98	Pierce County's Opposition to Plaintiff's Motion to Compel with attached Affidavit of Daniel R. Hamilton in Opposition to Motion to Compel
10/22/98	Plaintiff's Brief in Opposition to Motion for Protective Order
10/23/98	Order Granting Plaintiff's Motion to Compel Discovery
10/23/98	Order Denying Pierce County's Motion for Protective Order

10/23/98	CR 21 Motion to Drop Estate as a Party
10/23/98	Affidavit in Support of CR 21 Motion
10/23/98	Memorandum in Support of CR 21 Motion
10/29/98	Verbatim Transcript of Proceedings of October 23, 1998
10/30/98	Pierce County's Motion to Reconsider
10/30/98	Memorandum in Support of Pierce County's Motion to Reconsider with Affidavit of Ken Matthews
11/19/98	Plaintiffs' Brief in Opposition to Motion for Reconsideration
11/19/98	Plaintiffs' Memorandum in Opposition to Pierce County's CR 21 Motion
11/20/98	Order Denying Pierce County's Motion for Reconsideration
11/20/98	Amended Order Granting Plaintiffs' Motion to Compel Discovery
11/20/98	Notice of Discretionary Review
12/09/98	Pierce County's Reply to Plaintiff's Opposition to CR 21 Motion
01/21/99	Verbatim Report Transmitted to Division II

C. Washington State Court of Appeals

11/14/97	Notice of Appeal (No. 22614-6-II)
03/09/98	Verbatim Report of Proceedings (10/10/97)
05/22/98	Appellant's Brief
06/22/98	Respondent's Brief

07/22/98	Appellant's Reply Brief
01/15/99	Motion for Consolidation
01/15/99	Order Consolidating Appeal
12/07/98	Motion for Discretionary Review (No. 24021-1-II)
12/28/98	Response to Motion for Discretionary Review
01/07/99	Reply to Plaintiffs' Answer
01/15/99	Ruling Granting Review and Consolidating Cases
08/06/99	Opinion of Court of Appeals

D. Washington State Supreme Court

09/16/99	Petition for Review
10/04/99	Answer to Petition for Review
01/05/00	Order Granting Review
02/04/00	Petitioner's Supplemental Brief
02/07/00	Respondent's Supplemental Brief
02/11/00	Petitioner's Reply Brief
04/09/00	Ruling Consolidating Case (Whitmer)
06/12/00	Petitioner's Supplemental Brief Re: Federal Pre-emption
07/28/00	Respondent's Supplemental Brief
08/14/00	Petitioner's Reply Brief
10/24/00	Amicus Brief by State of Washington

09/13/01	Opinion of Washington Supreme Court
11/27/01	Orders Changing Opinion and Denying Further Reconsideration

APPENDIX A

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

IGNACIO GUILLEN Plaintiff, vs. Pierce County, a municipal corporation, Defendant.	)	NO. COMPLAINT TO REQUIRE DISCLOSURE OF DOCUMENTS

Plaintiff alleges as follows.

I.

PARTIES

1. Plaintiff, Ignacio Guillen, is a resident of Pierce County, Washington.

2. Defendant, Pierce County, is a municipal corporation organized under the laws of the State of Washington.

II.

BACKGROUND

3. On July 5, 1996 Plaintiff's wife, Clementina Guillen-Alejandre, was involved in an auto accident at the intersection of 168th Street East and B Street East in Pierce County, Washington. As a result of the accident, Clementina Guillen died.

4. According to newspaper reports there have been a number of accidents at this intersection in the past. The News Tribune on Thursday, July 11, 1996 reported that "Since 1990, 47 wrecks have occurred at the Spanaway intersection, an average of almost eight per year, county records show."

5. By a letter dated August 16, 1996 a request was made on behalf of the Plaintiff for the accident history at this intersection from the Defendant. By a letter dated September 9, 1996 the Defendant refused to provide the information.

6. By a letter dated October 28, 1996 a second request was made for the accident history at this intersection. The request stated:

> We are simply seeking information as to when accidents have occurred at the intersection for the last ten years. This would include any documents that record (1) the date of any such accidents, (2) the parties involved at each such accident, (3) the date of each such accident, (4) fatalities, if any, at each such accident, (5) the identification of all known accidents [should have been witnesses] at each such accident, (6) copies of photographs taken at each such accident, (7) the configuration of the intersection (what traffic signs existed) at the time of each such intersection [should have been accident], and (8) documents recording traffic counts at the intersection.

Once again the Defendant refused to provide the information except that it did provide information regarding traffic counts.

III.

JUDICIAL REVIEW OF AGENCY ACTIONS

7. RCW 42.17.340 provides for judicial review of a government agency's denial of a public disclosure request.

8. Defendant has wrongfully refused to provide information regarding the accident history of the intersection noted above.

9. Plaintiff is entitled to review the information that is the subject of this complaint. In addition, Plaintiff is entitled to recover his reasonable attorney fees, costs, and damages in the amount of $100.00 per day for the denial of this information.

WHEREFORE Plaintiff prays for the following relief:

1. Judgment in Plaintiff's favor ordering the Defendant to supply the requested information.

2. The award of attorney fees and costs incurred in bringing this action.

3. The award of damages of $100.00 for each day that the information was withheld by the Defendant.

4. For such further relief as this Court may deem just and proper.

Dated this 5 day of December, 1996.

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON &
DAHEIM, P.L.L.C.

By /s/ Salvador A. Mungia
Salvador A. Mungia
WSBA No. 14807
Attorneys for Plaintiff

APPENDIX B

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

IGNACIO GUILLEN Plaintiff, v. PIERCE COUNTY, a municipal corporation, Defendant.	)	NO. 96-2-13404-5 ANSWER TO COMPLAINT

Defendant, PIERCE COUNTY, answers Plaintiff's Complaint as follows:

I.

PARAGRAPHS OF COMPLAINT ADMITTED

Defendant admits the allegations contained in paragraphs 2, 5, 6, and 7 of Plaintiff's Complaint.

II.

PARAGRAPHS OF COMPLAINT DENIED FOR LACK OF KNOWLEDGE OF INFORMATION

Defendant does not have sufficient knowledge or information to form a belief as to the truth of the allegations in paragraphs 1, 3, and 4 of Plaintiff's Complaint.

III.

PARAGRAPHS OF COMPLAINT DENIED

Defendant denies paragraphs 8 and 9 of the Plaintiff's Complaint.

IV.

AFFIRMATIVE DEFENSES

Defendant alleges that the information sought by Plaintiff is not subject to public disclosure or discovery by operation of RCW 42.17.310(1)(j) and 23 USC ¶ 409. The Complaint, therefore, fails to state a claim upon which relief can be granted.

The foregoing, with supporting authority, was set forth in the letters dated September 9 and November 12, 1996 referenced in the Complaint.

V.

REQUEST FOR JUDGMENT

Defendant, PIERCE COUNTY, requests that judgment be entered as follows:

1. Dismissing Plaintiff's Complaint with prejudice and without an award of costs.

2. Awarding Defendant its statutory attorney's fees and costs.

3. Awarding Defendant any additional or further relief which the Court finds appropriate or just.

Dated this 10th day of January, 1997.

JOHN W. LADENBURG
Prosecuting Attorney

By /s/ Susan P. Jensen
SUSAN P. JENSEN, WSBA #12187
Deputy Prosecuting Attorney
Attorneys for Pierce County
Phone: 591-6503

APPENDIX C

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN, Plaintiffs, vs. PIERCE COUNTY, a municipal corporation, and THE ESTATE OF CLEMENTINA GUILLEN-ALEJANDRE, Defendants.	NO. 98 2 06119 2 COMPLAINT

Plaintiffs allege as follows:

I. PARTY

1. Plaintiff, Ignacio Guillen is the father and legal guardian of Jennifer and Alma Guillen.

2. Mariano Guillen is the father and legal guardian of Paulina and Fatima Guillen.

3. Pierce County is a political subdivision of the State of Washington.

4. Defendant Clementina Guillen-Alejandre, now deceased, was a resident of Pierce County, Washington.

II. FACTUAL BACKGROUND

5. On July 5, 1996, Jennifer, Alma, Paulina and Fatima Guillen were passengers in a car being driven by Clementina Guillen.

6. The Guillen vehicle was heading northbound on B Street in Pierce County, Washington.

7. In July of 1996 there were stop signs at the intersection of 168th Street East and B Street East for cars traveling along B Street. There was no traffic control signals for cars traveling along 168th Street at that intersection.

8. A car being driven by Shelton L. Cole II was traveling eastbound on 168th Street East.

9. As the vehicle being driven by Clementina Guillen was traveling through the intersection at B Street East and 168th Street East, it was struck by the vehicle being driven by the vehicle Shelton Cole, II.

10. Clementina Guillen was killed as a result of this automobile accident. The four plaintiff children were injured as a result of this traffic accident.

11. In the six years preceding this fatal accident, there have been at least 47 automobile accidents at the intersection at B Street East and 168th Street East. A number of fatalities have occurred prior to this accident at this intersection as a result of automobile accidents. Pierce County citizens had, prior to this accident, requested the Pierce County government to erect a four way stop signage

at this intersection. The Pierce County government refused to do so. The Pierce County government waited until after Clementina Guillen's death to erect a four way traffic control signage at this intersection.

III. CAUSE OF ACTION: NEGLIGENCE

11. Defendant, Pierce County owed a duty to the plaintiffs to have a traffic control at the intersection at issue that would provide for the safe and orderly control of traffic through that intersection. Defendant Pierce County breached this duty. As a direct and proximate result of this breach, the plaintiffs have been damaged in an amount to be proven at time of trial.

12. Defendant Clementina Guillen-Alejandre owed a duty to safely travel through the intersection at issue. Defendant Clementina Guillen breached that duty. As a direct and proximate result of that breach, the plaintiffs were injured in an amount to be proven at time of trial.

WHEREFORE, plaintiffs pray for the following relief:

1. That judgment be entered against the defendants, jointly and severally, for the damages suffered by the plaintiffs to be proven at time of trial.

2. For the reasonable attorney fees and costs in prosecuting this action.

3. For such further and other relief as this court may deem just and proper.

Dated this 8 day of April, 1998.

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON &
DAHEIM, P.L.L.C.

By /s/ Salvador A. Mungia
Salvador A. Mungia, WSBA No. 14807
Attorneys for Plaintiffs

APPENDIX D

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN, Plaintiffs, vs. PIERCE COUNTY, a municipal corporation, and THE ESTATE OF CLEMENTINA GUILLEN-ALEJANDRE, Defendants.	NO. 98 2 06119 2 **ANSWER OF DEFENDANT PIERCE COUNTY**

Comes now defendant Pierce County by and through counsel of record, Daniel R. Hamilton, Deputy Prosecuting Attorney, and in answer to plaintiffs' complaint, states as follows:

1. That in answer to the allegations contained in paragraphs 1 and 2 of plaintiffs' complaint, defendant Pierce County is without sufficient information to form a belief in the truth of the averments and therefore denies the same.

2. That in answer to the allegations contained in paragraphs 3 through 6, 8 and 12 of plaintiffs' complaint, defendant Pierce County admits the same.

3. That in answer to the allegations contained in paragraph 7 of plaintiffs' complaint, defendant Pierce County admits that in July of 1996 there were stop ahead signs and stop signs for cars traveling along "B" Street and approaching its intersection with 168th Street and cross-road warning signs for cars traveling along 168th Street approaching its intersection with "B" Street. Defendant Pierce County denies each and every remaining allegation contained in paragraph 7 not admitted herein as true.

4. That in answer to the allegations contained in paragraph 9 of plaintiffs' complaint, defendant Pierce County admits that the vehicle driven by Clementina Guillen failed to stop at the stop sign for travel along "B" Street East and collided in the intersection with a vehicle driven by Shelton L. Cole II. Defendant Pierce County denies each and every remaining allegation contained in paragraph 9 not admitted herein as true.

5. That in answer to the allegations contained in paragraph 10 of plaintiffs' complaint, defendant Pierce County admits that Clementina Guillen was killed as a result of the accident but is without sufficient information to form a belief in the truth of the remaining averments of said paragraph and therefore denies the same.

6. That in answer to the first paragraph 11 of plaintiffs' complaint, defendant Pierce County admits that some citizens had requested four way stop signage at the intersection and that after the accident in question such signage was temporarily installed. Defendant Pierce County denies that in the six years preceding the instant accident

in question there were 47 automobile accidents or a number of fatalities, and denies each and every remaining allegation contained in plaintiffs' first paragraph 11 pursuant to 23 U.S.C. § 409.

7. That in answer to the second paragraph 11 of plaintiffs' complaint, defendant Pierce County admits it owes a duty to exercise ordinary care in the construction and maintenance of its public roads to keep them in such a condition that they are reasonably safe for ordinary travel by persons using them in a proper manner and exercising ordinary care for their own safety but denies each and every remaining allegation contained in the second paragraph 11 of plaintiffs' complaint.

FURTHER, AND BY WAY OF AFFIRMATIVE AND OTHER DEFENSES, DEFENDANT PIERCE COUNTY ALLEGES AS FOLLOWS:

DISCRETIONARY IMMUNITY: All actions of defendant Pierce County herein alleged as negligence, manifest a reasonable exercise of judgment and discretion by authorized public officials made in the exercise of governmental authority entrusted to them by law and are neither tortious nor actionable.

CAPACITY: The plaintiffs lack capacity to sue, either individually or in a representative capacity.

MITIGATION OF DAMAGES: If the plaintiffs suffered any injury or damages, recovery therefor is barred or mitigated by plaintiffs' failure to mitigate said damages.

CLAIM FILING: The plaintiffs have failed to comply with the claim filing prerequisites of PCC 4.36 *et seq.*; RCW 36.45.010 and RCW 4.96 *et seq*.

PRIVILEGE: The conduct of this answering defendant was privileged and nontortious.

WHEREFORE, having fully answered plaintiffs' said complaint, defendant Pierce County prays the Court for the following relief:

[1] That plaintiffs' complaint be dismissed with prejudice;

[2] That defendant Pierce County be awarded its costs and reasonable attorney fees incurred herein;

[3] That defendants be allowed to reserve the right to amend this answer to assert such cross-claims, counter-claims and/or third party claims as during the course of discovery herein becomes proper;

[4] For such other and further relief as may appear just and equitable in the premises.

DATED this 13th day of May, 1998.

JOHN W. LADENBURG
Prosecuting Attorney

By /s/ Daniel R. Hamilton
DANIEL R. HAMILTON
Deputy Prosecuting Attorney
Attorneys for Def. Pierce County
PH: (253) 798-3612/WSBA #14658

APPENDIX E

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

IGNACIO GUILLEN, Plaintiff, v. PIERCE COUNTY, a municipal corporation, Defendants.	NO. 96 2 13404 5 DECLARATION OF THOMAS G. BALLARD, P.E., COUNTY ENGINEER

THOMAS G. BALLARD, P.E., declares under penalty of perjury under the laws of the State of Washington as follows:

1. I am a licensed professional engineer in good-standing in the State of Washington. I have been employed by the Public Works Department for Pierce County, Washington, for over 20 years. Since 1990, I have served as the duly-appointed County Engineer. I make this declaration in that capacity and upon my personal knowledge.

2. It is among my responsibilities to evaluate operational conditions, identify safety hazards and plan safety enhancements on County roads. This responsibility includes making application for funding for safety enhancements. All such work is done by me or at my direction and under my supervision.

3. The intersection at 168th Street East and B Street East in Pierce County has been evaluated and identified as appropriate for safety enhancement. The necessary safety enhancement has been planned. Of the documents

identified in the County's amended response to plaintiff's interrogatory no. 1, items 1-16 and 20 are reports and data compiled for those purposes. Item 19 is the design of the actual enhancement that was planned.

4. Items 17(a) and (b) and item 18 are prospectuses which are the actual applications made for safety enhancement funds. These prospectuses contain much of the actual information from the other items.

5. The prospectuses were sent to the Washington State Department of Transportation in application for federal-aid highway funds available under 23 U.S.C. § 152. Item 18, the first in time, was not granted. Item 17(a) was granted. Item 17(b) was an updated version that was required as a condition of the grant.

DATED this 23rd day of June, 1997, at Tacoma, Washington.

/s/ Thomas G. Ballard
THOMAS G. BALLARD, P.E.,
County Engineer

APPENDIX F

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

IGNACIO GUILLEN, Plaintiff, v. PIERCE COUNTY, a municipal corporation, Defendants.	)	NO. 96 2 13404 5 DECLARATION OF WAYNE T. GRUEN, P.E., DEPUTY ASSISTANT SECRETARY, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

WAYNE T. GRUEN, P.E., declares under penalty of perjury under the laws of the State of Washington as follows:

1. I am a duly-appointed Deputy Assistant Secretary of the Washington State Department of Transportation ("WSDOT"). I make this declaration in that capacity and upon my personal knowledge.

2. The grant of Hazard Elimination Funds pursuant to 23 U.S.C. § 152 is performed under my supervision. This duty is delegated to WSDOT from the Federal Highway Administration ("FHWA"). The funds are for the purpose of improving safety conditions on state highways and local roads. Application materials are kept on file at WSDOT and are subject to audit by FHWA.

3. Pierce County made application for 23 U.S.C. § 152 funds for the intersection at 168th Street East and B Street East, by submitting prospectuses dated 5/11/95 and 4/3/96.

4. Hazard Elimination Funds were granted for the intersection by letter dated July 26, 1996, a true and correct copy of which is hereto attached.

DATED this 24th day of June, 1997, at Olympia, Washington.

/s/ Wayne T. Gruen
WAYNE T. GRUEN, P.E.,
Deputy Assistant Secretary
Washington State Department of Transportation

Washington State Department of Transportation
Sid Morrison
Secretary of Transportation

Transportation Building
P.O. Box 47308
Olympia, WA 98504-7308

September 4, 1996

Mr. Tom Ballard
County Engineer
Pierce County
2401 South 35th Street
Tacoma, WA 98409-7485

Pierce County
"B" St. E./168th St. E. Signal
P-STPH-TA96(076)
FUND AUTHORIZATION
CRP 5223

Dear Mr. Ballard:

We have received FHWA fund authorization, effective August 29, 1996, for this project as follows:

PHASE	TOTAL	FEDERAL SHARE
Preliminary Engineering	$30,000	$27,000

In addition, categorical exclusion determination has been approved.

Enclosed for your information and file is a fully executed copy of Local Agency Agreement LA-3346 between the state and your agency. Also enclosed is a pre-printed Progress Bill form for the referenced project. Please forward this form to the person handling billings.

Federal funds for this project are limited to $180,000. All costs beyond those in the latest executed agreement are the sole responsibility of your agency.

Upon receipt of your certification of Right of Way, notification that the project is ready for advertisement and a supplement to the Local Agency Agreement which includes construction funds, the construction phase of this project will be considered for funding.

You may proceed with the administration of this project in accordance with your WSDOT approved Certification Acceptance agreement.

Sincerely,

/s/ Kathleen B. Davis for

WAYNE T. GRUEN, PE
Deputy Assistant Secretary
TransAid

WTG:ch
Enclosure
cc: Bob Holcomb, Olympic Region /7440

APPENDIX G

THE HONORABLE FREDERICK B. HAYES

FRIDAY, JULY 25, 1997

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

IGNACIO GUILLEN, Plaintiff, vs. PIERCE COUNTY, a municipal corporation, Defendant.	NO. 96-2-13404-5 DECLARATION OF DARRELL L. COCHRAN IN OPPOSITION TO DEFENDANT PIERCE COUNTY'S MOTION FOR SUMARY JUDGMENT AND SUPPORT OF PLAINTIFF'S CROSS MOTION

I, DARRELL L. COCHRAN, declare and state as follows:

1. I am an attorney of record for plaintiff Ignacio Guillen, I am over the age of 18, am competent, and make this declaration based upon personal knowledge.

2. The facts included in the background section of the Brief in Opposition/Cross-Motion are true and correct to the best of declarant's knowledge.

3. I am attaching true and correct copies of the following exhibits:

Exhibit A August 16, 1996 letter from Susan Blastick, of Gordon, Thomas, et al., to Joe DeRosa of Pierce County, requesting accident history of the intersection of 168th Street East and "B" Street East;

Exhibit B September 9, 1996 letter from Daniel Hamilton, Pierce County Deputy Prosecuting Attorney, denying public records request;

Exhibit C October 28, 1996 letter from Salvador Mungia to Daniel Hamilton, clarifying that the public records request does not seek information which may property [sic] be considered privileged;

Exhibit D November 12, 1996 letter from Daniel Hamilton to Salvador Mungia claiming that all public records regarding the subject intersection were privileged, yet failing to identify responsive public records and failing to explain how the asserted exemption/privilege applied to each public record;

Exhibit E Plaintiff's First Set of Interrogatories dated January 7, 1997 and Defendant's Answers thereto, dated February 14, 1997;

Exhibit F This document, a copy of Defendant's Answer to Plaintiff's Interrogatory No. 1, was marked as Exhibit #1 to the deposition of Thomas G. Ballard. The documents identified in this Exhibit were numbered 1-20;

Exhibit G True and correct excerpted pages from the deposition of Thomas G. Ballard, June 3, 1997;

Exhibit H June 5, 1997 letter from Susan Jensen, Pierce County Deputy Prosecuting Attorney, refusing to identify authors of Documents #8 and #12, and also refusing to disclose these documents;

Exhibit I June 10, 1997 letter from Susan Jensen to Salvador Mungia recanting the position taken in her June 5, 1997 letter and, further, belatedly producing Documents #8, 12, 14 and 16. This is Pierce County's concession that it improperly withheld these public records an improper act which caused Plaintiff to formally litigate over the public disclosure request; and

Exhibit J Pierce County's Amended Answer to Interrogatory No. 1, reflecting improper withholding of public records.

4. I have reviewed the accounting balance sheets which reflect the costs incurred by Ignacio Guillen in pursuing legal action including reasonable attorneys fees, against Defendant Pierce County to compel disclosure of public records. The breakdown is as follows:

Costs:	$ 24.00
Filing Fee	$ 24.00
Service of Process	$ 24.00
Total cost of Deposition and Transcript of Thomas Ballard	$ 358.60
Fees:	$3,200.00

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this ___ day of July, 1997 at Tacoma, Washington.

Darrell L. Cochran

June 13, 2002
Page 3

August 16, 1996

Joe DeRosa
Pierce County Risk Management Department
955 Tacoma Avenue South
Room 303
Tacoma, WA 98402

Re: Request for Accident History

Dear Mr. DeRosa:

Please be advised that we would like to request a complete copy of the accident history of the intersection of 168th Street East and "B" Street East, Tacoma, Pierce County, Washington.

If you have any questions or concerns regarding this request, please contact the undersigned.

Thank you for your consideration in this matter.

Very truly yours,

Susan J. Blastick, C.L.A.
Paralegal

SJB:sjb

EXHIBIT B

LETTER FROM DANIEL R. HAMILTON, PIERCE COUNTY DEPUTY PROSECUTING ATTORNEY

September 9, 1996

Susan J. Blastick, C.L.A.
GORDON, THOMAS, HONEYWELL, ET AL.
2200 First Interstate Plaza
1201 Pacific Avenue
Tacoma, WA 98402
RE: Public Disclosure Request
Dear Ms. Blastick:

Pierce County has received your August 16, 1996 request for the accident history concerning "168th Street East and B Street East, Tacoma, Pierce County, Indiana." Assuming you actually mean Pierce County, "Washington," the law is clear that Pierce County is precluded from providing these documents.

The public disclosure act exempts from disclosure records "which would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts." RCW 42.17.310(1)(j). Congress in 1991 amended 23 U.S.C. § 409 to provide as follows:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152, of this title or for the purpose of developing any highway safety construction improvement project which may be implemented

> utilizing Federal-aid highway funds *shall not be subject to discovery* or admitted into evidence in a Federal or *State court proceeding* or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

(Emphasis added). 168th Street East and "B" Street East are part of the Federal-aid highway system and your request seeks documents "compiled for the purpose of identifying evaluating or planning the safety enhancement of potential accident sites, hazardous roadway conditions . . . or for the purpose of developing any highway safety construction improvement project." Because federal and state courts uniformly have enforced the statute, e.g. *Harrison v. Burlington N. R.R. Co.*, 965 F.2d 155 (7th Cir. 1992); *Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433 (8th Cir. 1992); *Claspill v. Missouri Pac. R. Co.*, 793 S.W.2d 139 (Mo.) *cert. denied*, 112 L.Ed.2d 139 (1990); *Perkins v. Ohio Dept. of Trans.*, 584 N.E.2d 794 (Ohio Ct. App. 1989); *Sawyer v. Illinois Cent. Gulf R.R. Co.*, 606 So.2d 1069 (Miss. 1992); *Light v. State of New York*, 560 N.Y. S.2d 962 (Ct. Cl. 1990), we must respectfully deny your request.

Very truly yours,

JOHN W. LADENBURG
Prosecuting Attorney

BY
DANIEL R. HAMILTON
Deputy Prosecuting Attorney
PH: 591-7746

DRH/mj

October 28, 1996

Daniel R. Hamilton
Pierce County Office of Prosecuting Attorney
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2160

Re: 168th Street East and B Street East

Dear Dan:

This is in response to a letter dated September 9, 1996 that you wrote to Susan Blastick of my office.

As you may or may not know we represent the family of a woman who was killed at the intersection noted above. (You were correct when you assumed that the intersection exists in Pierce County, Washington and not Pierce County, Indiana.) Ms. Blastick, on behalf of the clients, requested information regarding the accident history at that intersection. It is my understanding that Pierce County is taking the position that it need not produce that documents [sic] under the Public Disclosure laws – specifically, RCW 42.17.310(j) and 23 U.S.C. § 409 are being relied upon by the County to justify non-disclosure.

I want to make the record clear that we are not seeking any reports that were specifically written for developing any safety construction improvement project at the intersection at issue. However, on behalf of our clients, we are seeking a copy of all documents that record the accident history of the intersection that may have been used in the preparation of any such reports. In other words, we are simply seeking information as to when accidents have occurred at the intersection for the last ten years. This would include any documents that record (1) the date of

any such accidents, (2) the parties involved at each such accident, (3) the date of each such accident, (4) fatalities, if any, at each such accident, (5) the identification of all known accidents at each such accident, (6) copies of photographs taken at each such accident, (7) the configuration of the intersection (what traffic signs existed) at the time of each such intersection, and (8) documents recording traffic counts at the intersection.

Obviously, the documents we are requesting would not contain any opinions by Pierce County representatives as to the safety of the intersection. Instead, we are seeking documents pertaining to facts.

If this clarifying letter changes your opinion please let me know when we can view the documents. If this letter does not change your opinion then I would appreciate a written response memorializing your position.

I look forward to hearing from you.

Very truly yours,

Salvador A. Mungia

SAM:sam
cc: Amparo and Mario Guillen
Ignacio Guillen

EXHIBIT D

LETTER FROM DANIEL R. HAMILTON, PIERCE COUNTY DEPUTY PROSECUTING ATTORNEY

November 12, 1996

Salvador A. Mungia
GORDON, THOMAS, HONEYWELL, ET AL.
2200 First Interstate Plaza
1201 Pacific Avenue
Tacoma, WA 98402
RE: Public Disclosure Request
Dear Sal:

This is in response to your letter of October 28 regarding your office's earlier request for the accident history concerning "168th Street East and B Street East . . . " Your letter lists eight categories of materials sought – some going beyond the earlier requested "accident history" to such things as "traffic counts at the intersection." As to the latter new traffic count request, such documents are attached hereto.

The remainder of the list however relates to data the County has compiled for the sole purpose of identifying evaluating or planning the safety enhancement of potential accident sites, hazardous roadway conditions or for developing highway safety construction improvement projects. We are precluded from providing these materials – whether or not they contain County opinions as to safety – because 23 U.S.C. § 409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or *data* compiled for the purpose of identifying evaluating or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or

> railway-highway crossings, pursuant to sections 130, 144, and 152, of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds *shall not be subject to discovery* or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

(Emphasis added). 168th Street East and "B" Street East are part of the Federal-aid highway system and the public disclosure act exempts from disclosure records "which would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts." RCW 42.17.310(1)(j).

Because, as previously documented in our earlier response, federal and state courts uniformly have enforced the statute, we must continue to respectfully deny your request.

Very truly yours,

JOHN W. LADENBURG
Prosecuting Attorney

BY

DANIEL R. HAMILTON
Deputy Prosecuting Attorney
PH: 591-7746

———

EXHIBIT E

ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

TO: Defendant, Pierce County

AND TO: Susan P. Jensen, its attorney.

DEFINITIONS AND PROCEDURES

A. Procedures: Plaintiff propounds the following interrogatories pursuant to CR 33, and you must file answers within thirty (30) days of service. For your convenience you have been served with two copies of the interrogatories. Please complete the answers within the space provided and, if needed, add additional pages. Return the signed and verified original to this office.

B. Scope of Answers: (1) Use of the pronoun "you" refers to Pierce County and it is intended that the answers include all information known to the persons to whom the interrogatories are directed, their attorneys and investigators; and (2) the term "accident" refers to the event(s) that is the subject of this lawsuit.

C. Document: As used herein the word "document" shall mean the original and any copy, regardless of origin or location, of any letter, memorandum, hand-written or typed note, record, report, working paper, graph, chart, index, data sheet or data processing card, map, drawing, book, periodical, pamphlet, tape, photograph or any other written, recorded or trancribed, punched, taped, filmed, photographic or graphic matter, however produced or reproduced, to which you have or have had access.

D. Supplemental Answers: These interrogatories and requests for production shall be deemed to be continuing, and in the event you discover further information that is responsive, you are required to supplement your answers and responses.

Interrogatory No. 1: Identify all documents that are within the control, possession, or custody of Pierce County that record, in any manner, the accidents that have occurred during the last ten years at the intersection of 168th Street East and B Street East in Pierce County, Washington.

Answer:

(See attached 2 pages.)

Interrogatory No. 2: Of the documents identified in the preceding interrogatory, identify the documents that were compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings pursuant to 23 U.S.C. § 130.

Answer:

None

Interrogatory No. 3: For each such document identified in your response to Interrogatory No. 2, identify each governmental source of the information contained within that document. For example, if the Washington State Patrol prepared a report which was used as an information source, then so state.

Answer:

N/A

Interrogatory No. 4: For each document identified in your response to Interrogatory No. 2, specify whether the document was sent to the U.S. Secretary of Transportation and if not, state whether the document was sent to any official of the United States government.

Answer:

N/A

Interrogatory No. 5: Identify all Pierce County officials or employees who prepared the documents that were identified in your response to Interrogatory No. 4.

Answer:

N/A

Interrogatory No. 6: Of the documents identified in your response to Interrogatory No. 1, identify the documents that were compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings pursuant to 23 U.S.C. § 144.

Answer:

None.

Interrogatory No. 7: For each such document identified in your response to Interrogatory No. 6, identify each governmental source of the information contained within that document. For example, if the Washington State Patrol prepared a report which was used as an information source, then so state.

Answer:

N/A

Interrogatory No. 8: For each document identified in your response to Interrogatory No. 6, specify whether the document was sent to the U.S. Secretary of Transportation and if not, state whether the document was sent to any official of the United States government.

Answer:

N/A

Interrogatory No. 9: Identify all Pierce County officials or employees who prepared the documents that were identified in your response to Interrogatory No. 8.

Answer:

N/A

Interrogatory No. 10: Of the documents identified in your response to Interrogatory No. 1, identify the documents that were compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings pursuant to 23 U.S.C. § 152.

Answer:

All of the documents identified were so compiled.

Interrogatory No. 11: For each such document identified in your response to Interrogatory No. 10, identify each governmental source of the information contained within that document. For example, if the Washington State Patrol prepared a report which was used as an information source, then so state.

Answer:

See responses to Interrogatory No. 1

Interrogatory No. 12: For each document identified in your response to Interrogatory No. 10, specify whether the document was sent to the U.S. Secretary of Transportation and if not, state whether the document was sent to any official of the United States government.

Answer:

Unknown to this defendant. Application for 23 U.S.C. 152 funding is made by Pierce County to the Washington State Department of Transportation (WSDOT).

Interrogatory No. 13: Identify all Pierce County officials or employees who prepared the documents that were identified in your response to Interrogatory No. 12.

Answer:

See answer to Interrogatory No. 1. All named individuals are County employees or officials.

Interrogatory No. 14: Of the documents identified by you in your response to Interrogatory No. 1, identify the documents compiled for the purpose of developing any highway safety construction improvement project which may be implemented using Federal-aid highway funds.

Answer:

All documents.

Interrogatory No. 15: For each such document identified in your response to Interrogatory No. 14, identify each governmental source of the information contained within that document. For example, if the Washington State Patrol prepared a report which was used as an information source, then so state.

Answer:

See response to Interrogatory No. 1.

Interrogatory No. 16: For each document identified in your response to Interrogatory No. 14, specify whether the document was sent to the U.S. Secretary of Transportation and if not, state whether the document was sent to any official of the United States government.

Answer:

See response to Interrogatory No. 12.

Interrogatory No. 17: Identify all Pierce County officials or employees who prepared the documents that were identified in your response to Interrogatory No. 14.

Answer:

See response to Interrogatory No. 13.

Interrogatory No. 18: Identify all Pierce County officials or employees who produced the documents identified in your response to Interrogatory No. 1 for all documents that you have not previously identified and who prepared the documents.

Answer:

See response to Interrogatory No. 17.

Interrogatory No. 1:

Answer: Objection.

The pending lawsuit requires the County to show cause why certain records requested by plaintiff's counsel in a letter dated October 28, 1996 are not subject to public disclosure. To the extent that this interrogatory may seek

information that goes beyond the original request, plaintiff seeks to discover information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. This defendant objects further that the information requested in items (1)-(7) of the third paragraph of the aforementioned letter is privileged and not subject to discovery, or public disclosure, pursuant to 27 U.S.C. 409 and 42.17.310(j). The information requested in item (8) was previously provided by the County and is in plaintiff's possession.

Without waiving objection, defendant identifies the following documents:

Motor vehicle traffic accidents by location – County of Pierce – prepared by Records Section, Washington State Patrol, 1/190 – 6/30/96.

"B" Street and 168th St. East, background on intersection traffic conditions, July 8, 1996, prepared by James Ellison.

168th St. East, "B" Street East, traffic signal warrants evaluation, prepared by staff, Traffic Division, Pierce County Public Works, Manager James Ellison.

Collision diagram dated 5/6/96 and attached accident list and reports, prepared by Georgia Fischer and the Washington State Patrol.

Collision diagram dated 4/21/95 prepared by Georgia Fischer.

December 22, 1988, memo from James Mitchell to James W. Ellison.

January 4, 1989, memo from Jim Ellison to Vern E. Wagner and John O. Trent.

December 15, 1988 letter to Jack Bujacich.

August 2, 1988 memo from Jim Ellison to Tom Ballard.

Collision diagram dated 1/5/89 prepared by Georgia Fischer.

Collision diagram dated 7/18/88 prepared by Georgia Fischer.

Letter received 7/7/88 to Department of Traffic and Engineering.

Police Traffic Collision Reports and Motor Vehicle Reports from 1/1/90 prepared by law enforcement agencies.

Memo dated 1/23/89 to Barbara Gelman from Jim Ellison.

Draft letter to Barbara Gelman from Frederick L. Anderson with note to file signed by Jim Ellison on 3/6/89.

Pierce County Road Department complaint form with 11/18/88 date notation. Prepared by James Ellison.

Letter dated 8/15/96 to WSDOT from Jacqueline Spears, County Design Engineer, with attached Prospectus Submittal Check List and Federal Aid Project Prospectus (signed by Thomas G. Ballard on 8/6/96) and Local Agency Agreement.

Project Application Check List and Federal Aid Project Prospectus signed by Thomas G. Ballard on 5/11/95.

Draft Pierce County Public Works and Utilities Transportation Services, Traffic Division, Traffic-Design Report, CRP 5223. Prepared under the Supervision of Thomas G. Ballard, County Road Engineer.

Memo 7/11/96 James Ellison to file.

The defendant also has a copy of the newspaper article referenced in the complaint.

EXHIBIT F
EXHIBIT 1 TO BALLARD DEPOSITION

Interrogatory No. 1:

Answer: Objection.

The pending lawsuit requires the County to show cause why certain records requested by plaintiff's counsel in a letter dated October 28, 1996 are not subject to public disclosure. To the extent that this interrogatory may seek information that goes beyond the original request, plaintiff seeks to discover information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. This defendant objects further that the information requested in items (1)-(7) of the third paragraph of the aforementioned letter is privileged and not subject to discovery, or public disclosure, pursuant to 27 U.S.C. 409 and 42.17.310(j). The information requested in item (8) was previously provided by the County and is in plaintiff's possession.

Without waiving objection, defendant identifies the following documents:

1.[1] Motor vehicle traffic accidents by location – County of Pierce – prepared by Records Section, Washington State Patrol, 1/190 [sic]-6/30/96.

2. "B" Street and 168th St. East, background on intersection traffic conditions, July 8, 1996, prepared by James Ellison.

3. 168th St. East, "B" Street East, traffic signal warrants evaluation, prepared by staff, Traffic Division, Pierce County Public Works, Manager James Ellison.

4. Collision diagram dated 5/6/96 and attached accident list and reports, prepared by Georgia Fischer and the Washington State Patrol.

5. Collision diagram dated 4/21/95 prepared by Georgia Fischer.

6. December 22, 1988, memo from James Mitchell to James W. Ellison.

7. January 4, 1989, memo from Jim Ellison to Vern E. Wagner and John O. Trent.

8. December 15, 1988 letter to Jack Bujacich.

9. August 2, 1988 memo from Jim Ellison to Tom Ballard.

10. Collision diagram dated 1/5/89 prepared by Georgia Fischer.

11. Collision diagram dated 7/18/88 prepared by Georgia Fischer.

12. Letter received 7/7/88 to Department of Traffic and Engineering.

---

[1] Italics in this document indicate handwritten notations made to this form.

13. Police Traffic Collision Reports and Motor Vehicle Reports from 1/1/90 prepared by law enforcement agencies.

14. Memo dated 1/23/89 ~~to~~ *from* Barbara Gelman ~~from~~ *to* Jim Ellison.

15. Draft letter to Barbara Gelman from Frederick L. Anderson with note to file signed by Jim Ellison on 3/6/89.

16. Pierce County Road Department complaint form with 11/18/88 date notation. Prepared by James Ellison.

17. Letter dated 8/15/96 to WSDOT from Jacqueline Spears, County Design Engineer, with attached Prospectus Submittal Check List and Federal Aid Project Prospectus (signed by Thomas G. Ballard on 8/6/96) and Local Agency Agreement.

18. Project Application Check List and Federal Aid Project Prospectus signed by Thomas G. Ballard on 5/11/95.

19. Draft Pierce County Public Works and Utilities Transportation Services, Traffic Division, Traffic-Design Report, CRP 5223. Prepared under the Supervision of Thomas G. Ballard, County Road Engineer.

20. Memo 7/11/96 James Ellison to file.

The defendant also has a copy of the newspaper article referenced in the complaint.

EXHIBIT G
DEPOSITION OF THOMAS G. BALLARD
by Byers & Anderson, Inc.,
Court Reporting and Records Collection
June 3, 1997

Q Looking at the first document that's identified by Pierce County in response to Interrogatory No. 1, could you tell me how Pierce County obtained that document?

A The document is a computerized report that was prepared by the records section of the State Patrol and is supplied to us.

Q No. 1 consists of more than one document; is that correct?

A It is one document, multiple pages.

Q Is it supplied on an annual basis?

A It used to be a quarterly basis, but it doesn't seem to necessarily be consistently quarterly at this point.

Q Do all the counties get this?

A I would assume so, but I couldn't say for sure.

Q That's one you can tell me you don't know.

A Okay.

Q To whom does the report go to at Pierce County? Let's start with the department, first of all.

A It's sent to this department. I don't believe it has any position title to it. It's simply Pierce County Department of Public Works.

Q And then inside the Public Works Department, how does that document get filed, if you will? Where is it kept?

A It would come through my office, typically, and then be sent to the Traffic Division where it would be housed in their library, so to speak, under the Traffic Engineer.

Q Do you actually review these reports?

A Not in detail. I usually assign that to the traffic division to do for me.

Q And how many reports will the Public Works Department keep before it starts purging the older reports?

A I'd have to check our retention schedule, but I would think it's, like, seven years.

Q Is this document sent to any other department of Pierce County other than the Public Works Department, Traffic Division?

A No.

Q In this report, will it give the names of the people who are involved in the traffic accidents?

MS. JENSEN: Objection; calls for information that's privileged.

MR. MUNGIA: Go ahead. You can answer.

MS. JENSEN: I'm instructing you not to answer.

Q (By Mr. Mungia) Okay. Are you not answering this question based upon the instruction by your attorney?

A That's correct.

Q I want to make it clear. I'm not asking for any names. I'm asking whether it contains the names. Does it also, these reports by the –

MS. JENSEN: Just a minute. You're not going to ask for specific names. You want to know whether it contains names?

MR. MUNGIA: That was all my question was at the present time.

MS. JENSEN: I'm going to continue with my instruction. I think any information that is within that document is privileged.

Q (By Mr. Mungia) And do those reports contain the addresses of the people who are involved with the accidents?

MS. JENSEN: Same objection.

THE WITNESS: Same response.

Q (By Mr. Mungia) And do those reports contain the phone numbers of the people who are involved within those accidents?

MS. JENSEN: Same objection.

THE WITNESS: Same response.

Q (By Mr. Mungia) We're going to go through a lot of this, but I've got to make the record. Do those reports contain the names of witnesses to those accidents?

MS. JENSEN: Same objection.

THE WITNESS: Same response.

Q (By Mr. Mungia) And do those reports contain the addresses of those witnesses?

MS. JENSEN: Same objection.

THE WITNESS: Same response.

Q (By Mr. Mungia) And do those reports contain the phone numbers of those witnesses?

MS. JENSEN: Same objection.

THE WITNESS: Same response.

Q (By Mr. Mungia) Well, maybe we can get a three-part harmony here if we get this down. Do those reports contain the dates that the accident occurred?

MS. JENSEN: Same objection.

THE WITNESS: Same response.

Q (By Mr. Mungia) And will those reports contain the specific location of the accidents?

MS. JENSEN: Same objection.

THE WITNESS: Same response.

Q. (By Mr. Mungia) Do those reports contain the time of day of those accidents?

MS. JENSEN: Same objection.

THE WITNESS: Same response.

Q (By Mr. Mungia) Are these reports made accessible to anyone by the Pierce County Public Works Department?

A Do you want to repeat the question?

Q Yes. The reports that are given by the Washington State Patrol that we've just been talking about, No. 1 on Exhibit No. 1, are those given out by Pierce County to any person or entity?

MS. JENSEN: You mean outside of Pierce County?

Q (By Mr. Mungia) Outside of the Pierce County Public Works Traffic Department.

A Yes.

Q First of all, is it given to any person or entity not employed by Pierce County?

A Not to my knowledge.

Q I'm curious because there was a – once in a while I'll read in the TNT, Tacoma News Tribune, Morning News Tribune, saying that a certain number of accidents have occurred at a location. I'm wondering if the Public Works Department has given those documents to any of the news media.

A Absolutely not.

Q And Pierce County has not given those documents to any other governmental agency?

A We would have given them to other departments internal to Pierce County.

Q But not non-Pierce County governmental departments?

A We may have given them to the State Department of Transportation.

. . .

evaluating and assessing operation conditions on our public roads.

Q Any other purposes?

A Well, once we assess or evaluate the operating conditions, it would allow us to make recommendations, if warranted, for improvements. It would help us prioritize those improvements, seek funding for those improvements, program the project, if funded, and implement the project.

Q Any other purposes?

A No.

Q Do the documents within No. 1 of Exhibit No. 1 contain photographs of the accidents?

MS. JENSEN: Objection; calls for privileged information.

MR. MUNGIA: You have to –

THE WITNESS: I'll decline to respond.

MS. JENSEN: I'm instructing the witness not to answer.

Q (By Mr. Mungia) Based upon your attorney's instruction; is that correct?

A That's correct.

Q Does Pierce County receive any other information from a source outside of a Pierce County agency regarding accidents at a particular intersection?

A On Exhibit 1, Item 13, the Police Traffic Collision Reports and Motor Vehicle Reports.

Q That's from an outside agency?

A That's correct.

Q Any others?

A No.

Q So the corollary to my previous question would be all the documents except for 1 and 13, then, were prepared by some employee or agency of Pierce County; is that correct?

A All the rest of them included in here are prepared by us, would have been prepared by some employee of Pierce County.

Q Let me ask a few questions. I'm going to jump to 13, then. On the police traffic collision reports, are those separate from the motor vehicle reports or is that all one long title for a document?

A It's essentially all one long title for a document reporting the accidents.

Q Do some of those reports, then, come from the Pierce County Sheriff's Department?

A It would be whatever investigating law enforcement agency filled out the report would have been –

whoever the investigating officer was. It is not always the Pierce County Sheriff.

Q From the best of your knowledge, tell me all the different law enforcement agencies that have provided reports or reports such as would be found in No. 13.

A Understanding there may be an exception in the whole pile, but typically –

Q I'm not going to hold you to this.

A Typically, they're either the sheriff or state patrol that investigate accidents on county roads.

Q So the Tacoma Police Department usually wouldn't give you this type of report?

A Not on a county road.

Q Are those supplied at some regular interval like quarterly or are they supplied shortly after the accident?

A Typically, we will get a batch of reports that run from three to maybe five months after the actual report is filled out. We'll receive them, you know, randomly as a package of these will come in to us.

Q About to do our song and dance again. On No. 13, would those reports include the names of the people who had been involved in the accidents?

MS. JENSEN: Objection; calls for privileged information. I'm instructing the witness not to answer.

THE WITNESS: I'll choose not to answer based on those instructions.

Q (By Mr. Mungia) And do the reports identified in No. 13 of Exhibit No. 1 identify the addresses for the people who were involved within those accidents?

MS. JENSEN: Same objection.

THE WITNESS: Same response.

Q (By Mr. Mungia) And do the reports identified in Exhibit 1, No. 13, identify the phone numbers of the people who were involved in those accidents?

MS. JENSEN: Same objection.

THE WITNESS: Same response.

Q (By Mr. Mungia) And do those reports in No. 13 of Exhibit 1 identify by name, address, and telephone number the witnesses to the accidents?

MS. JENSEN: Same objection.

THE WITNESS: Same response.

Q (By Mr. Mungia) And do those reports identified in Exhibit 1, No. 13, identify the law enforcement officers who investigated the report or investigated the accidents?

MS. JENSEN: Same objection.

THE WITNESS: Same response.

Q (By Mr. Mungia) And do the reports identified in Exhibit 1, No. 13, contain photographs of the accident?

MS. JENSEN: Same objection.

THE WITNESS: Same response.

Q (By Mr. Mungia) Where are the reports identified in No. 13 of Exhibit No. 1 kept within the Public Works Department?

A A copy of the original is kept in the Traffic Division.

Q Is that the only copy kept within the Public Works Department?

A Yes.

Q Is this kept in the same file that we would find No. 1 documents of Exhibit No. 1?

A No.

Q Does the file have a name which contain [sic] the documents found under No. 13 of Exhibit No. 1?

A It's simply a file containing the Police Traffic Collision Reports and Motor Vehicle Reports.

Q Do you know what other agencies, non-Pierce County agencies, receive a copy of these reports?

A Pierce County is, to my knowledge, the only agency that would receive the report for unincorporated Pierce County roads.

Q So as far as you know, it would be the Pierce County Sheriff's Department and the Pierce County Public Works Department that have copies of the documents contained within No. 13 of Exhibit No. 1?

A Well, I know for sure we have a copy of it. I would not know for sure whether or not the sheriff has a copy of it.

Q If the Pierce County Sheriff Department investigated the accident, then they would keep a copy of that, to your knowledge?

A I don't know.

Q Are the documents contained within Exhibit 1, No. 13, distributed or released to any non-Pierce County entity by Pierce County?

A They would be exactly the same as No. 1. No.

Q Are the documents contained within No. 13 of Exhibit 1 used in the same manner as the documents found in No. 1 of Exhibit No. 1?

A That's correct.

Q Do you know whether any of the documents within No. 13 of Exhibit No. 1 have been sent to the Washington State Department of Transportation?

A It would be the same response as to No. 1.

Q You'd have to check the files?

A Yes.

Q And do you know whether any of the exhibits found within No. 13 of Exhibit No. 1 have been sent to any federal government agency or department?

A Again, we do not correspond directly with the federal

. . .

A The prime purpose was to brief both Vern and John on the current operation condition of the intersection at 168th and "B" Street.

Q Let's go to No. 8. Who wrote this December 15th, 1988, letter?

A I'd have to refer back to the document to find out who wrote the letter.

Q Is that something that you can do handy? Is it close by, you can look at it?

A I don't have a copy of it here. I'd have to go upstairs to the other end of the building to look at the file.

Q Can we do that, just take a five-minute break?

MS. JENSEN: I'd like to look at it. Maybe you can reserve the question. It may contain privileged information. The sender of the letter, I may need to give some identify [sic] on that.

MR. MUNGIA: The identity of the person?

MS. JENSEN: That may be privileged. I just want to see.

MR. MUNGIA: Can you do that, and if you don't think it's privileged, in a follow up say it was sent by John Doe. If it is privileged, say, "I think it's privileged and I'm not going to reveal it." It probably won't be necessary for me to ask you questions about it. But just in case, we can do that at another time.

Q (By Mr. Mungia) Who's Jack Bujacich?

A Jack, at the time –

MS. JENSEN: Didn't we just name a bridge after him?

THE WITNESS: A road. At the time, he was the department's ombudsman.

Q (By Mr. Mungia) Is he still employed by Pierce County?

A No, he has since retired.

Q Is he still alive?

A Yes.

Q Still reside in Pierce County?

A I believe so, although I understand he travels a tremendous amount.

Q Has any person or entity outside of Pierce County government employees or officials seen a copy of the December 15th, 1988, letter?

A To my knowledge, there hadn't been any.

Q Has the contents of the December 15th, 1988, letter been given by Pierce County to any non-Pierce County employee or official?

A No.

Q Either in writing or orally?

A No.

Q Within Pierce County, what other employee or official has seen the December 15th, 1988, letter?

A I don't know.

Q Does the December 15th, 1988, letter contain the names, addresses, and telephone numbers of people who

had been involved in automobile accidents at the intersection of 168th Street East and "B" Street East?

MS. JENSEN: Objection; calls for privileged information. Advise witness not to answer.

THE WITNESS: I choose not to respond based on Counsel's advice.

Q (By Mr. Mungia) Does the December 15th, 1988, letter contain the names, addresses, and telephone numbers of witnesses to automobile accidents occurring at 168th Street East and "B" Street East?

MS. JENSEN: Same objection and same advice.

THE WITNESS: Same response.

Q (By Mr. Mungia) What was the purpose, if you know, of the December 15th, 1988, letter?

A I believe the essential content of the letter was to share with Jack their concern relative to the operation of the intersection at 168th and "B" Street.

Q Is this letter written by a non-Pierce County person, non-Pierce County employee or official?

. . .

Q So it's not something you can do with information before you here?

A No.

MS. JENSEN: Just to clarify, and I don't mean to try to take control, but for the sake of clarity, can we assume that that information would have been included in

the preparation of one of the reports that appears as an exhibit on this document?

THE WITNESS: That's correct. And most likely, although I would want to go back and double-check, it would be No. 9.

Q (By Mr. Mungia) Is this an assumption or did we say it was included in No. 9?

A Well, without going back and absolutely making sure, I don't want to perjure myself, but based on my recollection of reviewing the documents, it would have been included in No. 9.

Q Let's go to No. 14. In 1989, what position did Barbara Gelman hold?

A I just noticed it should read memo dated 1/23/89 from Barbara Gelman to Jim Ellison rather than to Barbara Gelman from Jim Ellison.

Q Could you take my pen, mark Exhibit No. 1, and put your initials by the correction?

A (Witness complying.)

Q Do you recall my question?

A No.

Q What position did Barbara Gelman hold in January of 1989?

A She would have been a council member.

Q So that was Pierce County Council member; is that correct?

A That's correct.

Q Was this memo addressed to anybody other than to Jim Ellison?

A I don't believe so.

Q To your knowledge, has this memo been given by Pierce County to any non-Pierce County employee or official?

A No.

Q To your knowledge, has the information contained within this memo been given by Pierce County to any non-Pierce County employee or official?

A No.

Q To your knowledge, who, other than Jim Ellison, has seen this memo?

A I would have seen it and Fred Anderson would have seen it. I don't believe anyone else would have seen it in the department.

Q In 1989, what position did Fred Anderson hold?

A I believe he was Executive Director of County Operations and also Director of Public Works.

Q Did the memo dated January 23rd, 1989, contain the names, addresses, and telephone numbers of people who had been involved in automobile accidents at the intersection of 168th Street East and "B" Street East?

MS. JENSEN: Objection to the extent that the question goes to the contents of the memo. That information is privileged. Instruct the witness not to answer.

THE WITNESS: I choose not to respond based on the advice of Counsel.

Q (By Mr. Mungia) Does the memo dated January 23rd, 1989, contain the names, addresses, and telephone numbers of witnesses to automobile accidents occurring at the intersection of 168th Street East and "B" Street East?

MS. JENSEN: Same objection.

THE WITNESS: Same response.

Q (By Mr. Mungia) Do you know what the purpose was for Ms. Gelman issuing this memo?

A Primarily to share her concern relative to the intersection of 168th and "B" Street.

Q What has Pierce County done with this memo as far as using it in any way?

A We would have taken the memo and, along with other letters and information collected, we would have compiled it into the information relative to our assessment of operations of the intersection of 168th and "B" Street.

Q Let's go to No. 15. Has No. 15 been given to any entity outside Pierce County by Pierce County?

A No.

Q Has the information within No. 15 been given either orally or in writing to any entity outside of Pierce County by Pierce County?

A I don't believe so.

Q Who else, within Pierce County, has seen the letter by Mr. Anderson other than Ms. Gelman – well, let me just leave it at that. Other than Ms. Gelman.

A I apologize. I didn't hear the first part of the question, whether it was inside Pierce County or –

Q Correct. No one outside of Pierce County has seen this as far as you know?

A That's correct.

Q So who within Pierce County has seen it other than Ms. Gelman?

A I do not know.

Q So is this – what is this? Two documents: one is a draft of a letter by Mr. Anderson, and then a separate document of a memo to the file signed by Mr. Ellison?

A My recollection is that Mr. Ellison had a handwritten note on the first page of the draft letter.

Q Do you know whether this letter was ever finalized?

A It was not.

Q Well, did Ms. Gelman ever see a copy of this letter, then?

A I don't know.

Q What was the purpose of this draft letter?

A The purpose was to respond in writing from Fred Anderson, who would be the department director, to the memorandum in Item 14.

Q All right. Let's go to No. 16. Has this complaint form been given to any entity outside of Pierce County by Pierce County?

A No.

Q To your knowledge, no entity outside of Pierce County has seen this memo, then, or complaint?

A That's correct.

Q Who, within Pierce County, has seen a copy of this complaint?

A I'm not sure, but it would typically be limited to staff of the Traffic Division.

Q Does this complaint contain the names, addresses, and telephone numbers of people involved with automobile accidents at the intersection of 168th Street East and "B" Street East?

MS. JENSEN: Objection; calls for privileged information. And I instruct the witness not

* * *

EXHIBIT H

LETTER FROM SUSAN P. JENSEN, PIERCE COUNTY DEPUTY PROSECUTING ATTORNEY

June 5, 1997

Sal A. Mungia
Gordon Thomas Honeywell
Malanca Peterson & Daheim, PLLC
1201 Pacific Avenue, Suite 2200
Tacoma, WA 98402

RE: **Guillen v. Pierce County/Cause No. 96 2 13404 5**

Dear Sal:

In the course of Mr. Ballard's deposition on June 3, you asked for the identities of the authors of two letters described in the County's response to your interrogatory no. 1. For purposes of the deposition, you described those documents as nos. 8 and 12 of Exhibit 1. You also asked for the date of Exhibit 8. We agreed to consider your requests and respond by letter.

Exhibit 8 is dated December 15, 1988, as shown on our answer to interrogatory no. 1.

The County has previously described both letters in sufficient detail to demonstrate that they are subject to privilege pursuant to 23 USC 409. In our answers to your interrogatory no. 10 and in Mr. Ballard's deposition testimony, it has been stated that the documents were collected and compiled for the purpose of preparing applications for safety enhancement funds. *See*, 23 USC 409 and 23 USC 152.

Because these documents are subject to privilege, their contents, including the names of their authors, are not subject to disclosure. RCW 42.17.310. Although we are prepared to produce these documents *in camera* to Judge Hayes, disclosure of their authors to you would be paramount to waiving privilege as to their contents. The County declines to do so.

Very truly yours,

SUSAN P. JENSEN
Deputy Prosecuting Attorney
Phone: 798-6503

cc: Tom Ballard, P.E.

EXHIBIT I

MISCELLANEOUS DOCUMENTS

LETTER FROM SUSAN P. JENSEN, PIERCE COUNTY DEPUTY PROSECUTING ATTORNEY

June 10, 1997

Sal A. Mungia
Gordon Thomas Honeywell
Malanca Peterson & Daheim, PLLC
1201 Pacific Avenue, Suite 2200
Tacoma, WA 98402

RE: **Guillen v. Pierce County/Cause No. 96 2 13404 5**

Dear Sal:

For purposes of the Public Disclosure Act only, the County has determined that it will not claim privilege regarding items 8, 12, 14 and 16 (as you numbered them) in our response to your interrogatory no. 1. They are enclosed. Item 8 itself answers your question to Mr. Ballard regarding its author.

My apologies for any confusion caused to you by my letter with contrary information sent late last week. The County hereby withdraws its objections regarding production of those documents in this matter.

Very truly yours,

SUSAN P. JENSEN
Deputy Prosecuting Attorney
Phone: 798-6503

Enclosures

LETTER FROM CECILY BEST,
TEACHER, THOMPSON ELEMENTARY

December 15, 1988

Mr. Jack Bujacich
Department of Public Works
2401 South 35th Street
Tacoma, Washington 98409

Dear Mr. Bujacich,

You are aware of the traffic problem at the intersection of 168th Street East and B Street in Spanaway. Numerous

letters, protesters and much media interest have focused on citizen concerns regarding the lack of sufficient traffic control devices and the number of fatal accidents that occur at or near this intersection. The latest fatality, in August, was a 14 year old boy.

On October 19, 1988, I was involved in a collision at this corner. While my car was totalled, my life and that of the other driver, was spared and I was able to return to work within a few days.

I am truly appalled that to date no electronic traffic control devices have been installed at this intersection. I can appreciate tight budgets and limited fiscal resources, but certainly funds must be made available to improve traffic conditions at such dangerous intersections.

Further, there are many students, grades kindergarten through 12th, who walk to and from school in this area and must cross either the intersection of 168th and B, or 168th and A Street. These children walk along a route that has no crosswalk markings. The children have no marked pathway to follow – a dangerous situation at any time, made more so by winter's dark mornings.

You certainly have my support, to include increased taxes, to do the necessary. . . . let us hope what needs to be done *is* done before another life is lost.

Yours Repectfully,

CECILY BEST
Teacher, Thompson Elementary

cc: The Honorable Judge Thomas Larkin

LETTER TO THE DEPARTMENT OF TRAFFIC AND ENGINEERING, PIERCE COUNTY

Barbara A. Gallagher
421 So. 169th St.
Spanaway, Washington 98387
535-2934

To The Department of Traffic and Engineering, Pierce County.

Im [sic] writing this letter in concern about the dangerous intersection located at 168th East B Spanaway. The residents and myself in the Spanaway area are concerned about all the traffic accidents and fatalities that have occured over many years at this intersection.

We ask at this time that a four way stop or traffic signal be installed as soon as possible. Please look into this quickly before another fatality occurs.

Thank you

Barbara A. Gallagher
C.A.A.C.
Citizens Awareness Against Crime

Newspaper Article Enclosure:
Traffic light needed

I have lived in Spanaway near 168th and B streets since January. On June 24, at about 6 p.m., I witnessed a fatal car and bicycle accident. This boy was only 14 years old. This is the second such accident I have seen since March. I have also seen many near accidents in the past months.

I don't know the exact circumstances of this most recent accident, but people speed at this intersection literally 24 hours a day. I cannot help but wonder how many other

children and adults will suffer or die because Pierce County officials do not see the serious need for a traffic light at this intersection. I, for one, will never forget Justin K. Pelser, age 14, or how I heard his mother screaming for her son when she arrived at the scene.

Please, let's do something to prevent this from ever happening again. Everyone involved suffers terrible pain. Just ask that man who hit Justin and was crying uncontrollably if he wishes there had been a traffic light.

I would like to add that within five minutes of the call being made, there were many very dedicated and professional EMS personnel on the scene doing absolutely everything they could to save Justin's life. I was so impressed by them, I felt they needed recognition for what is often a very difficult and thankless job.

MICHELLE LEE
Spanaway

MEMORANDUM TO JIM ELLISON, ACTING TRAFFIC ENGINEER, PUBLIC WORKS DEPARTMENT

January 23, 1989

To: Jim Ellison, Acting Traffic Engineer, Public Works Department

From: Barbara Gelman, Councilmember

Subject: Speed turtles at 168th & East B Street intersection

In the past there has [sic] been meetings and discussions concerning safety factors at the 168th & East B Street

intersection. Last fall I spent a day picketing with the community leaders there, and I know fatalities have occurred at this intersection.

I am requesting that something be done at the intersection. If signalization is not possible, I would like to request that speed turtles be installed, as well as additional signage, indicating that this is a school zone area. Considering the increase in traffic over the past five years, I am outraged that this intersection has not been given a higher priority.

Please contact me as soon as possible as to when this can be done.

BG:dj

cc: Jake [sic] Bujacich
Fred Anderson
John Trent
Barbara Gallagher

PIERCE COUNTY MEMORANDUM

PIERCE COUNTY
Office of

_____

MEMORANDUM

Date: 12/2

From: _____

To: _____

Barbara Gelman
B/168th St
follow-up study
by end of Dec
shoot for
12-9

COMPLAINT FORM, PIERCE COUNTY ROAD DEPARTMENT

PIERCE COUNTY ROAD DEPARTMENT

COMPLAINTS

Date _____
Received By JWE
NAME: Barb Gallagher
Address: 421 – So. 169th St.
Span 98387
Tel. No. 535-2934
Subject: B St/168th St
– accident
speeds
[illegible]
also – [illegible] to Meg 11-18-88
Referred: _____
Road Dist. _____
Disposition: _____
Z-716

PIERCE COUNTY MEMORANDUM

PIERCE COUNTY
Office of

_____

MEMORANDUM

Date: _____

From: _____

To: _____

* Roy Hansen
115 E 168th
168/A St & B St
Lot of accidents
Req'st. rumble strip on two streets –
place at angle –
was in one ('76) an accident

COMPLAINT FORM, PIERCE COUNTY ROAD DEPARTMENT

Barbara Gelman
Marilyn Rasmussen

[illegible]

PIERCE COUNTY ROAD DEPARTMENT

COMPLAINTS

Date 6/27/88
Received By JWE
NAME: Barbara Gallagher, CAAC Citizens Aware.
Against Crime

Address: 421 – S. 169th, Span 98387
Tel. No. 535-2934
Subject: B St E/168th St E

- she & area residents (she says) want 4-way stop
- boy's fault – 14 yrs old – didn't stop for stop sign
- she's written letter – will be sent to Traffic Eng

Referred: _____
Road Dist. _____
Disposition: _____
Z-716

EXHIBIT J

PIERCE COUNTY'S AMENDED ANSWER TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION

COMES NOW Pierce County and amends its answer to Interrogatory No. 1 as follows:

ANSWER TO INTERROGATORY NO. 1: Objection.

The pending lawsuit requires the County to show cause why certain records requested by plaintiff's counsel in a letter dated October 28, 1996 are not subject to public disclosure. To the extent that this interrogatory may seek information that goes beyond the original request, plaintiff seeks to discover information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. This defendant objects further that the information requested in items (1)-(7) of the third paragraph of the aforementioned letter is privileged and not subject to discovery, or public disclosure, pursuant to 23 U.S.C. § 409 and 42.17.310(j). The information

requested in item (8) was previously provided by the County and is in plaintiff's possession.

Without waiving objection, defendant identifies the following documents:

1. Motor vehicle traffic accidents by location – County of Pierce – prepared by Records Section, Washington State Patrol. 1/190 [sic] – 6/30/96.

2. "B" Street and 168th St. East, background on intersection traffic conditions, July 8, 1996, prepared by James Ellison.

3. 168th St. East, "B" Street East, traffic signal warrants evaluation, prepared by staff, Traffic Division, Pierce County Public Works, Manger James Ellison.

4. Collision diagram dated 5/6/96 and attached accident list and reports, prepared by Georgia Fischer and the Washington State Patrol.

5. Collision diagram dated 4/21/95 prepared by Georgia Fischer.

6. December 22, 1988 memo from James Mitchell to James W. Ellison.

7. January 4, 1989 memo from Jim Ellison to Vern E. Wagner and John O. Trent.

8. December 15, 1988 letter to Jack Bujacich. **PROVIDED TO PLAINTIFF.**

9. August 2, 1988 memo from Jim Ellison to Tom Ballard.

10. Collision diagram dated 1/5/89 prepared by Georgia Fischer.

11. Collision diagram dated 7/18/88 prepared by Georgia Fischer.

12. Letter received 7/7/88 to Department of Traffic and Engineering. **PROVIDED TO PLAINTIFF.**

13. Police Traffic Collision Reports and Motor Vehicle Reports from 1/1/90 prepared by law enforcement agencies.

14. Memo dated 1/23/89 from Barbara Gelman to Jim Ellison. **PROVIDED TO PLAINTIFF.**

15. Draft letter to Barbara Gelman from Frederick L. Anderson with note to file signed by Jim Ellison on 3/6/89.

16. Pierce County Road Department complaint form with 11/18/88 date notation. Prepared by James Ellison. **PROVIDED TO PLAINTIFF.**

17.A. Federal Aid Prospectus signed 4/3/96.

17.B. Letter dated 8/15/96 to WSDOT from Jacqueline Spears, County Design Engineer, with attached Prospectus Submittal Check List and Federal Aid Project Prospectus (signed by Thomas G. Ballard on 8/6/96) and Local Agency Agreement.

18. Project Application Check List and Federal Aid Project Prospectus signed by Thomas G. Ballard on 5/11/96.

19. Draft Pierce County Public Works and Utilities Transportation Services, Traffic Division, Traffic-Design Report, CRP 5223.

Prepared under the supervision of Thomas G. Ballard, County Road Engineer.

20. Memo 7/11/96 James Ellison to file.

The defendant also has a copy of the newspaper article referenced in the complaint.

APPENDIX H

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

IGNACIO GUILLEN Plaintiff, v. PIERCE COUNTY, a municipal corporation, Defendants.	NO. 96 2 13404 5 SUPPLEMENTAL DECLARATION OF THOMAS G. BALLARD, P.E., COUNTY ENGINEER

THOMAS G. BALLARD, P.E., declares under penalty of perjury under the laws of the State of Washington as follows:

1. I hereby reassert all of the facts in my first declaration in this matter signed by me on June 23, 1997 and filed with the County's Motion for Summary Judgment as Exhibit A. I make this supplemental declaration upon my personal knowledge.

2. Item 15 among the documents submitted to the Court for *in camera* review is the draft of a memorandum from Fred Anderson, then Public Works Director, to Barbara Gelman, then County Council member. It consists of information used for the County's application for federal funds for safety enhancement at the intersection of 168th Street East and B Street East.

3. Items 8, 12, 14 and 16 are items that were initially not disclosed to plaintiff. Each of these items is a communication to the County regarding a perceived problem at the intersection. The County considered these

documents in planning the safety enhancement of the intersection for funding application purposes and for that reason, upon the advice of counsel, they were not disclosed.

4. Our counsel advised us not to invoke the Section 409 privilege for documents that we did not consider crucial to protect the County's legal position. After reflection, and upon the advice of the Deputy Prosecutor, I determined that it was not necessary to assert the privilege for these particular documents, and they were provided to plaintiff.

DATED this 16th day of July, 1997, at Tacoma, Washington.

/s/ Thomas G. Ballard
THOMAS G. BALLARD, P.E.,
County Engineer

APPENDIX I

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

IGNACIO GUILLEN Plaintiff, v. PIERCE COUNTY, a municipal corporation, Defendants.	NO. 96 2 13404 5 THIRD DECLARATION OF THOMAS G. BALLARD, P.E., COUNTY ENGINEER

THOMAS G. BALLARD, P.E., declares under penalty of perjury under the laws of the State of Washington as follows:

1. I hereby affirm and adopt herein by this reference all statements in the earlier two declarations made by me in this cause. I am aware that the Court has stated that it does not believe that the documents at issue in this matter were collected and compiled for the purpose of making application for federal funds for safety improvements at the intersection here at issue. I offer the following statements for clarification to the Court. I make this declaration upon my personal knowledge.

2. It is among my duties as County Engineer to oversee all aspects of County road operation, design, and construction. This requires the constant monitoring and study of accidents and safety conditions; the planning, design and implementation of safety improvements; the identification of funding sources for the implementation of

those improvements; the applications for such funds; and the construction of the improvements.

3. The subject intersection, 168th Street East at B Street East, has been part of the federal aid highway system for more than 20 years. As such, it has been eligible for federal aid highway funds, including those available under 23 U.S.C. § 152, upon a showing of need and appropriate planning and design for safety improvements. As previously stated in the declaration of Wayne Gruen, the decision whether to award Section 152 funds is up to the Washington State Department of Transportation (WSDOT) acting as the agent of the Federal Highway Administration.

4. The County applied for and was granted Section 152 funds to construct safety improvements at the subject intersection. A 1995 application was denied; and 1996 application was granted.

5. Two of the documents at issue are items 1 and 13. Item no. 13 is a collection of the accident reports for the subject intersection from 1990 through 1996. Item no. 1 is a list of those same accidents showing the location, time, date and nature of the accident. A study of the accidents at the intersection was a crucial element in the County's review of the operation and safety of the intersection. The County collected those accident reports solely for that purpose. The decision to apply for Section 152 funds was based in large part on those accident reports. The nature of the accidents, as identified in those reports, was a critical determining factor in the County's design of the safety improvement for which application was made. The WSDOT requires the County to fill out a prospectus to apply for Section 152 funds. (Item nos. 17, 17A and 18 are

the actual prospectuses.) The prospectus specifically requires an accident history. If the County did not collect and analyze the accident reports, it would not be possible to plan and implement the safety improvements and it would be impossible to apply for and receive Section 152 funds.

6. Items 10 and 11 are collision diagrams prepared by a County employee who is responsible for investigating accidents at the intersection. The collision diagrams were used to consider whether the design of the intersection was a causative factor in the accidents and what, if any, design improvements could be made to increase safety and lessen the possibility of future accidents. Collision diagrams are a critical element in the County's design of improvements. The Section 152 application specifically requires an explanation and design of the proposed improvement. Items 10 and 11 (as were items 4 and 5) were compiled and used specifically for the purpose of determining the need for and designing the signalization improvement that was the basis of the Section 152 application and that was ultimately installed at the intersection.

7. Items 1, 13, 10 and 11 were specifically used to make the decision to apply for Section 152 funds and to make the application. If the County had not collected items 1 and 13 and if the County had not prepared and compiled items 10 and 11, the Section 152 funds could not have been applied for and the safety improvement would not be in place today.

DATED this 30th day of September, 1997, at Tacoma, Washington.

/s/ Thomas G. Ballard
THOMAS G. BALLARD, P.E.,
County Engineer

APPENDIX J

SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN, Plaintiffs vs. PIERCE COUNTY, a municipal corporation, and THE ESTATE OF CLEMENTINA GUILLEN-ALEJANDRE, Defendants	NO. 98-2-06119-2 DECLARATION OF JULIANA T. KENDALL, IN SUPPORT OF MOTION TO COMPEL DISCOVERY HEARING DATE: October 9, 1998

I, JULIANA T. KENDALL, hereby declare as follows:

1. I am one of the attorneys for the plaintiffs in the above-named action.

2. Attached hereto as Exhibit "A" is a true and correct copy of Plaintiffs' First Set of Interrogatories and Request for Production of Documents to Defendant Pierce County and Answers Thereto.

3. On July 29, 1998 at 10:00 a.m. plaintiffs' counsel, Juliana T. Kendall and Salvador A. Mungia, and Pierce County's counsel, Daniel R. Hamilton, conducted a CR

26(i) telephone conference regarding the discovery responses.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

SIGNED this ___ day of September, 1998 in Tacoma, Washington.

Juliana T. Kendall

APPENDIX K

SUPERIOR COURT OF THE
STATE OF WASHINGTON

FOR PIERCE COUNTY

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN, Plaintiffs, vs. PIERCE COUNTY, a municipal corporation, and THE ESTATE OF CLEMENTINA GUILLEN-ALEJANDRE, Defendants.	NO. 98 2 06119 2 ORDER DENYING PIERCE COUNTY'S MOTION FOR RECONSIDERATION November 20, 1998 JUDGE JOHN A. McCARTHY

THIS MATTER having come before this Court on Defendant Pierce County's Motion for Reconsideration, the Court having reviewed the records and files herein, having heard argument of counsel, and being fully advised of the matters involved herein, now, therefore, it is hereby

ORDERED that Defendant Pierce County's Motion for Reconsideration is hereby DENIED.

DONE IN OPEN COURT this 20 day of November, 1998.

/s/ John A. McCarthy
THE HONORABLE
JOHN A. MCCARTHY

Presented By:

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM, P.L.L.C.

By /s/ Darrell L. Cochran
Darrell L. Cochran22851
Juliana T. Kendall, WSBA No. 27778
Attorneys for Plaintiffs

Approved as to Form:

JOHN W. LADENBURG
Prosecuting Attorney

By /s/ _____
Daniel R. Hamilton, WSBA #14658
Deputy Prosecuting Attorney
Attorneys for Defendant Pierce County

Supreme Court, U.S.
FILED
JUL 2 2002
OFFICE OF THE CLERK

No. 01-1229

IN THE

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF ON THE MERITS FOR PETITIONER

GERALD A. HORNE
Prosecuting Attorney
DANIEL R. HAMILTON *
SUSAN P. JENSEN
Deputy Prosecuting Attorneys
955 Tacoma Avenue South
Suite 301
Tacoma, WA 98402
(253) 798-7746

* Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

74pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether 23 U.S.C. § 409, which protects certain documents "compiled or collected" in connection with certain federal highway safety programs from being discovered or admitted in federal or state trials "for damages arising from any occurrence at a location mentioned or addressed" in those documents, is a valid exercise of Congress' power under the Supremacy, Spending, Commerce or Necessary and Proper Clauses of the United States Constitution.

2. Whether private plaintiffs have standing to assert "states' rights" under the Tenth Amendment where their State's Legislative and Executive branches expressly approve and accept the benefits and terms of the federal statute in question.

PARTIES TO PROCEEDING BELOW

All parties to the proceeding in the Washington Supreme Court, the court whose judgment is the subject of this petition, do not appear in the caption of this case. In *Guillen v. Pierce County* co-defendant estate of Clementina Guillen-Alejandre settled with plaintiffs before suit and has no interest in the case. *See* 10/23/98 CR 21 Motion Aff., Ex's "1-4." Similarly, all parties to *Whitmer v. Yuk,* which had been consolidated with *Guillen* only for appellate purposes, have since also settled as well as been dismissed. *See* Cert. App. "I." Nevertheless, the parties to the proceeding in the Washington Supreme Court were:

1. Pierce County, a municipal corporation (defendant in *Guillen* and *Whitmer*);

2. Ignacio Guillen as legal guardian for Jennifer and Alma Guillen (plaintiff in *Guillen*);

3. Mariano Guillen as legal guardian for Paulina and Fatima Guillen (plaintiff in *Guillen*);

4. The Estate of Clementina Guillen-Alejandre (settling defendant in *Guillen*);

5. Robert and LuAnn Whitmer, individually and as guardians of Shana, Hanna and Denel Whitmer (plaintiff in *Whitmer*);

6. Chin S. and "Jane Doe" Yuk (defendant in *Whitmer*);

7. Chang and "Jane Doe" Choi (defendant in *Whitmer*);

8. City of Lakewood, a municipal corporation (defendant in *Whitmer*);

9. City of Tacoma, a municipal corporation (defendant in *Whitmer*).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO PROCEEDING	ii
TABLE OF AUTHORITIES	vi
REPORT OF OPINIONS	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	1
A. Creation of Coordinated State Safety Program	1
B. Congress Strengthens Section 409 Protection	5
C. Pierce County Applies for Cooperative State Safety Funds and Protection	7
D. Washington Courts Refuse to Enforce Section 409 Protection	10
SUMMARY OF ARGUMENT	15
ARGUMENT	17
A. "States Rights" and the Tenth Amendment are not at Issue	17
1. Tests for Tenth Amendment Violation are not Met	17
2. Tenth Amendment Does not Allow State Courts to Reject Federal Prescriptions	19
3. Plaintiffs Cannot Assert "States Rights"	20
B. Congress' Enumerated Powers Authorize Section 409	23

TABLE OF CONTENTS—Continued

	Page
1. Spending Clause Authorizes Section 409 Privilege	24
a. Section 409 is Part of Conditional Program	25
b. "Federal Interest" for Section 409 Well Established	27
c. *Guillen* Defeats Reasonably Related Federal Interest	31
2. Commerce Clause Also Authorizes Section 409	32
a. "Direct Relation" to Federal Goal Not Required	33
b. Data at Issue Exists Because of Federal Law	34
3. Necessary and Proper Clause Authorizes § 409	35
C. The Supremacy Clause Requires Enforcement of Section 409 as Written	37
1. Section 409 is Unambiguous and Clearly Applies Here	38
a. Language of Statute Mandates Protection	39
b. Legislative History of Statute Mandates Protection	40
c. Legislative Purpose Mandates Protection	41

TABLE OF CONTENTS—Continued

	Page
2. Section 409 Protects Also Against Forced Disclosure of Information Contained Within Protected Documents and Discovery of those Documents From Third Parties	44
a. Section 409 Protects Data Within Documents	45
b. Section 409 Protects Documents When Also Held by Third Parties	46
CONCLUSION	48
APPENDIX	1a

TABLE OF AUTHORITIES

CASES

	Page
Agostini v. Felton, 521 U.S. 203, 237 (1997)	22
Alden v. Maine, 527 U.S. 706, 752 (1999)	19
Atlanta Gas Light Co. v. U. S. Dept. of Energy, 666 F.2d 1359, 1368 (11th Cir. 1982)	22
Arizona Employers' Liability Cases, 250 U.S. 400, 419-422 (1919)	23
Bunting v. State, 87 Wn.App. 647, 654, 943 P.2d 347 (1997)	9
Chas C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937)	21
City of Atlanta v. Watson, 267 Ga. 185, 475 S.E.2d 896, 903-4 (1996)	44
Claspill v. Miss. Pac. R.R. Co., 793 S.W.2d 139, 141 (Mo.), *cert. denied*, 498 U.S. 984 (1990)	18, 32
Close v. Glenwood Cemetery, 107 U.S. 466, 475 (1883)	24
Coniker v. New York, 181 Misc. 2d 801, 695 N.Y.S.2d 492, 496 (N.Y.Ct.Cl. 1999)	*passim*
Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88 n. 32 (1978)	23
Duncan v. Union Pac. R.R. Co, 790 P. 2d 595 (Utah App. 1990), *aff'd*, 842 P.2d 832 (Utah 1992)	25
Ex parte Alabama Dept. of Transp., 757 So.2d 371 (Ala. 1999)	13
Ex parte Alabama Highway Dept., 572 So.2d 389 (Ala.1990), *cert. denied*, 502 U.S. 937 (1991)	5, 16
Ex parte Alabama Highway Dept., 575 So.2d 389 (Ala. 1990) *cert. denied*, 502 U.S. 937 (1991)	29
F.E.R.C. v. Mississippi, 456 U.S. 742, 758 n. 22 (1982)	16, 20, 33
Ferguson v. Skrupa, 372 U.S. 726, 728-29 (1963)	16, 36

TABLE OF AUTHORITIES—Continued

	Page
Fry v. So. Pacific Trans. Co., 715 So.2d 632 (La. App. 1998)	13
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 554 (1985)	15, 18
Gaubert v. Denton, 1999 WL 350103 (E.D.La. May 28, 1999) *aff'd* 210 F.3d 368 (5th Cir. 2000)	7
Geier v. American Honda Motor Co., 529 U.S. 861 (2000)	23
Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)	49
Guillen v. Pierce County, 96 Wn.App. 862, 982 P.2d 123 (1999)	12, 17, 23
Guillen v. Pierce County, 139 Wn.2d 1015, 994 P.2d 847 (2000)	13
Guillen v. Pierce County, 144 Wn.2d 696, 31 P.3d 628 (2001)	*passim*
Harrison v. Burlington Northern Rail Co., 965 F.2d 155, 160 (7th Cir. 1992)	17, 29, 39, 45
Helvering v. Davis, 301 U.S. 619 (1937)	21
Hester v. CSX Transportation, Inc., 61 F.3d 382, 387 (5th Cir. 1995)	46
Hodel v. Indiana, 452 U.S. 314, 329 n. 17 (1981)	*passim*
INS v. Chadha, 462 U.S. 919, 944 (1983)	24
Irion v. State, 760 So.2d 1120 (La.App. 2000)	47
John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989)	13, 39
Kelly v. Robinson, 479 U.S. 36, 43 (1986)	39
Kitts v. Norfolk & W. Ry, 152 FRD 78, 81 (S.D. W.Va. 1993)	6
Light v. State, 149 Misc.2d 75, 560 N.Y.S.2d 962, 965 (N.Y. Ct. Cl. 1990)	25
Lochner v. New York, 198 U.S. 45 (1905)	48

TABLE OF AUTHORITIES—Continued

	Page
Lusby v. Union Pacific R.R. Co., 4 F.3d 639, 641 (8th Cir. 1993)	13
Mackie v. Grand Trunk Western R. Co., 544 N.W.2d 709, 711 (Mich. App. 1996)	13
Martin v. Hunter's Lessee, 1 Wheat. 304, 340-341 (1816)	20
Martinolich v. Southern Pac. Transp., 532 So.2d 435, 437 (La.Ct.App.), *cert. denied*, 490 U.S. 745 (1988)	30
Mountain States Legal Found. v. Costle, 630 F.2d 754, 761-62 (10th Cir. 1980), *cert. denied*, 450 U.S. 1050 (1981)	22
McCulloch v. Maryland, 4 Wheat. 316, 419-21 (1819)	36
Nance v. Environmental Protection Agency, 645 F.2d 701, 716 (9th Cir.1981)	22
Newman v. King County, 133 Wn.2d 565, 572-73, 947 P.2d 712 (1997)	40
New York v. United States, 505 U.S. 144, 188 (1992)	*passim*
Norfolk Southern Railway v. Shanklin, 529 U.S. 344 (2000)	20
Palacios v. Louisiana and Delta Railroad Inc., 740 So. 2d 95, . 6 (La. 1999)	5, 13, 16, 29
Palacios v. Louisiana and Delta Railroad, 775 So.2d 698, 701 (La.App. 2000)	*passim*
Perkins v. Ohio Dept. of Transp., 65 Ohio App. 3d. 487, 84 N.E. 2d 794 (1989), *cause dismissed*, 57 Ohio St.3d 612, 566 NE 2d 673, *rehearing denied*, 58 Ohio St.3d 711, 570 N.E. 2d 281 (1991)	29
Price v. Kitsap Transit, 125 Wn.2d 456, 886 P.2d 556 (1994)	8

TABLE OF AUTHORITIES—Continued

	Page
Printz v. United States, 521 U.S. 898, 928-29 (1997)	15, 19, 26
Reichert v. State of Louisiana, 694 So.2d 193 (La. 1997)	13, 28, 35, 41
Reno v. Condon, 528 U.S. 141, 151 (2000)	19, 24
Robertson v. Union Pacific R. Co., 954 F.2d 1433, 1435 n. 3 (8th Cir. 1992)	13, 25, 29, 39
Rodenbeck v. Norfolk and Western Ry. Co., 982 F.Supp. 620, 622-25 (N.D. Ind. 1997)	17, 39, 45, 46
Rodriguez de Ouijas v. Shearson/ American Express, Inc., 90 U.S. 477, 484 (1989)	22
S. Pac Transp. Co. v. Yarnell, 181 Ariz. 316, 890 P.2d 611, 614 (1995)	6
Sawyer v. Ill. Cent.Gulf R.R. Co., 606 So.2d, 1069 (Miss. 1992)	30, 44, 45
Seaton v. Johnson, 898 S.W.2d 232, 235-37 (Tenn. App. 1995)	5, 13, 44
Second Employers' Liability Cases, 223 U.S. 1, 50 (1912)	23
Seniors Civil Liberties Ass'n v. Kemp, 965 1030, 1033 n. 6 (11th Cir. 1992)	22
SHOTS v. CSX Transp., 887 F.Supp. 204, 205 (S.D. Ind. 1995)	45, 46
Silver v. Silver, 280 U.S. 117, 122 (1929)	23
Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989)	8
South Carolina v. Baker, 485 U.S. 505, 512 (1988)	17
South Dakota v. Dole, 483 U.S. 203, 211-12 (1987)	15, 24, 30
St. Louis S.W. Ry. Co. v. Malone Freight Lines, 39 F.3d 864, 867 (8th Cir. 1994)	47

TABLE OF AUTHORITIES—Continued

	Page
State of Alabama Highway Dept. v. Boone, No. 90-1412 (U.S. 1991)	4, 5, 26, 28
Taylor v. St. Louis S.W. Ry. Co., 746 F.Supp. 50, 53-54 (D. Kan. 1990)	47
Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 144 (1939)	15, 21, 22
Testa v. Katt, 330 U.S. 386, 392-93 (1947)	20, 23
United States v. Lopez, 514 U.S. 549, 558-59 (1995)	32
United States v. Morrison, 529 U.S. 598 (2000)	32
United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494 (2001)	38
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976)	23, 36
Vermont Assembly of Home Health Agencies Inc. v. Shalala, 18 F.Supp. 2d 355, 370-71 (D.Vt. 1998)	22
Warth v. Seldin, 422 U.S. 490, 499 (1975)	21
Wiedeman v. Dixie Electric Membership Corp. 627 So.2d 170, 173 (La. 1993), *cert. denied*, 511 U.S. 1127 (1994)	6, 40, 41

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article I, § 8, clause 1	24
U.S. Constitution, Article I, § 8, clause 3	32
U.S. Constitution, Article I, § 8, clause 18	35
U.S. Constitution, Article VI, clause 2	19
U.S. Constitution, Amendment X	*passim*
Washington Constitution, Article 11, Section 1	12, 6a
Washington Constitution, Article 11, Section 4	12, 6a
Washington Constitution, Article 11, Section 5	12, 9a

TABLE OF AUTHORITIES—Continued

STATUTES

	Page
RCW 4.28.080	12, 1a
RCW 4.92.090	8, 3a
RCW 4.96.010	8, 3a
RCW 42.17.310 (1)(j)	9
RCW 47.04.050	3, 21
RCW 47.04.060	3, 21
RCW 47.04.070	3, 21
15 U.S.C. § 6606(c)(3)	47
23 U.S.C. § 121	3
23 U.S.C. § 130(d)	3
23 U.S.C. § 144(a)	3
23 U.S.C. § 152	*passim*
23 U.S.C. § 152(a)	3
23 U.S.C. § 152(b)	25
23 U.S.C. § 402	4, 26
23 U.S.C. § 402(a)	2, 26
23 U.S.C. § 402(k)(1)	4
23 U.S.C. § 402(k)(4)	25
23 U.S.C. § 409	*passim*
42 U.S.C. § 1306	47

REGULATIONS

WAC 136-28-010	2, 8, 12, 16, 34, 42, 46, 4a
WAC 136-28-020	2, 8, 12, 42, 46, 4a
WAC 136-28-030	2, 8, 12, 42, 5a

RULES

Federal Rules of Evidence 407	39
Federal Rules of Evidence 408	39
Federal Rules of Evidence 412	39

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

Act of November 18, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N. (109 Stat.) 591 .....6, 28, 35, 40
Bernard Schwartz, *A History Of the Supreme Court* at 190-245 (1993) 48
Brief for the United States as *Amicus Curiae*, *State of Alabama Hwy Dept v. Boone*, No 90-141[illegible] (U.S. 1991).....4, 5, 16, 26, 28, 29, 41
C. Mueller & L. Kirkpatrick, 2 *Federal Evidence*, § 173 at 240-251 (2d Ed. 1994)..... 47
The Federalist No. 44, at 281 (C. Rossiter ed. 1961) (J. Madison)..... 49
Forrest McDonald, *States Rights and The Union: Imperium in Imperio* (2000)..... 49
Highway Safety Act of 1973. Pub. L. No. 93-87, 87 Stat. 282 (codified as amended at 23 U.S.C. 101 *et seq.*)..... 2
H.R. Rep., No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859 ..... 2, 3
Louisiana App. __: 5/4/83 USDOT Memo.....4, 26, 41
Report No. 1700, House of Representative 89th Congress, 2nd Session, July 15, 1966..... 2
Roll Call 679, H.R. 2274, 104th Congress (Sept. 20, 1995), available at *http://clerkweb.house.gov/egibin/vote.exe?year=1995&rollnumber=679*..... 6
Roll Call 582, S. 440, 104th Congress (Nov. 17, 1995), available at *http://www.senate.gov/legislative/vote1041/vote_00582.html* 6
1976 Second Annual Report on Highway Safety Improvement Programs, House Document No. 94-386 3

TABLE OF AUTHORITIES—Continued

Page

U.S. Dept. Of Trans., *Highway Safety Program Standards* 2
U.S. Dept. of Trans., *1996 Annual Report on Highway Safety Improvement Programs*, at IV-3, IV-5 (Apr. 1996)..... 7
U.S. Dept. Of Trans., *1999 Status of the Nation's Highways, Bridges and Transit: Conditions And Performance* 1, 7
Webster's New World Dictionary 374 (1966) 45

OPINIONS AND ORDERS BELOW

The opinion of the Washington Supreme Court (Cert. App. "A") is published at 144 Wn.2d 696, 31 P.3d 628 (2001), and its denial of reconsideration (Cert. App. "B") is published at 35 P.3d 1218 (2001). The opinion of the Washington Court of Appeals (Cert. App. "H") is published at 96 Wn.App. 862, 982 P.2d 123 (1999), but its commissioner's order granting discretionary review (Cert. App. "G") is unpublished. The orders of the Pierce County Superior Court on summary judgment (Cert. App. "C"), denying a protective order (Cert. App. "D"), granting motion to compel (Cert. App. "E"), amending its order to compel (Cert. App. "F") and denying reconsideration (J.A. 87) are unpublished.

JURISDICTION

The Supreme Court of Washington's opinion in this case was entered September 13, 2001, and rehearing was denied November 27, 2001. The petition for writ of certiorari was filed February 22, 2002, and granted April 29, 2002. This Court has jurisdiction under 28 U.S.C. Section 1257.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The relevant constitutional, statutory and regulatory provisions are set out in the Appendix to the Petition for Certiorari and the Appendix to this brief.

STATEMENT OF THE CASE

A. Creation of Coordinated State Safety Program

In 1966—a year in which 50,894 (or 25.9 of every 100,000) people were killed in traffic accidents on the nation's roadways—Congress enacted the first federal legislation concerning highway safety. U.S. Dept. Of Trans., *1999 Status of the Nation's Highways, Bridges and Transit: Conditions And Performance*, at 5-3 to 5-4. The Highway

Safety Act of 1966 provided that each participating state should "have a highway safety program" pursuant to uniform standards promulgated by the Secretary of Transportation. *See* 23 U.S.C. § 402(a). Thereafter the United States Department of Transportation (hereinafter "USDOT") established highway safety program standards, including "data systems program" standards for "routinely collected information" that "comprise the data base for all aspects of a coordinated State traffic safety program." U.S. Dept. Of Trans., *Highway Safety Program Standards*, at 16. The "objective of this data systems program" was to "upgrade all aspects of the accident information system, starting with the *collection of raw data*, followed by its encoding, storage, retrieval, analysis, and ultimate dissemination to users." *Id.* (emphasis added). As a 1966 Congressional report noted, the collection and storage of "[u]niform, complete and accurate accident reports, . . ., subject to rapid retrieval and analysis" was not only necessary to the safety program, but "[n]o other part of the State program is as basic to ultimate success, nor as demanding of complete cooperation at every jurisdictional level . . . ." *Id.* (quoting Report No. 1700, House of Representative 89th Congress, 2nd Session, July 15, 1966, p. 11). Expressly pursuant to this federal legislation, the state of Washington incorporated these standards for raw accident data into its Administrative Code and thereby dictated procedures for all subsequent accident reports in the state. *See* WAC 136-28 *et seq.*

In 1972 accidents on the nation's highways had resulted in 56,000 deaths, over 4 million injuries and $40 billion in economic loss. H.R. Rep., No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1888-89. Noting this "escalating tide of mayhem on our highways," *id.*, Congress enacted the Highway Safety Act of 1973. Pub. L. No. 93-87, 87 Stat. 282 (codified as amended at 23 U.S.C. 101 *et seq.*) This program necessitated "improved coordination and cooperation on a program and project level between Federal, State and local authorities, and between the public and private sectors" so

there could be a "multi-pronged attack on those highway-related factors which contribute to most accidents." H.R. Rep., No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1888-89. Accordingly, an essential part of this funding program included the now express statutory requirement that participating states gather data identifying and evaluating potential accident sites and hazardous highway conditions. *See* 23 U.S.C. §130 (d)(Rail-Highway Crossing Program); 23 U.S.C. §152 (a) (Hazard Elimination Program); 23 U.S.C. § 144(a) (Highway Bridge Program). This allows participating states to apply for and obtain federal funds for those state roadways most deserving of attention. *See generally* 23 U.S.C. §121; J.A. 22-23.

Even before the 1966 Highway Safety Act, the Washington State legislature had "assent[ed] to the purposes, provisions, terms and conditions of the grant of money provided" to an earlier version of the federal statute, as well as "all acts, grants and appropriations amendatory and supplementary thereto and affecting the State of Washington." *See* RCW 47.04.050. Likewise, both before and after the 1973 Highway Safety Act, the state legislature expressly authorized the state's Department of Transportation to enter into agreements with the United States government to secure such federal money for county roads. *See* RCW 47.04.060. *See also* 47.04.070 (Conforming with federal requirements in cooperative construction or improvement of roads). However, Congressional funding alone was not sufficient to induce total participation. States were "very concerned" and "expressed strong objection" to the absence of any confidentiality for their compliance efforts "because of legal actions resulting from accidents at these locations before an improvement can be made." *1976 Second Annual Report on Highway Safety Improvement Programs*, House Document No. 94-386, p. 36. Indeed, it was consistently brought to the attention of the USDOT that states' "highway departments are reluctant to [compile information to identify and prioritize roadway

hazards] for fear that acknowledging the existence of hazardous conditions would expose them to liability." *See* Louisiana App.: 5/4/83 USDOT Memo. *See* also Brief for the United States as *Amicus Curiae* at 10, *State of Alabama Highway Dept. v. Boone*, No. 90-1412 (U.S. 1991). Accordingly, in 1983 the USDOT recommended enactment of legislation "to prevent the unauthorized disclosure of *information* that States *compile* in good faith to meet the purposes of Federal aid highway programs to eliminate or reduce hazardous roadway conditions." *Id* (emphasis added).

In 1984 Congress added section (k) to 23 U.S.C. § 402—which conditioned a state's eligibility for highway safety funds under that statute on "if" it either "certifies to the Secretary that it has in operation a computerized traffic safety recordkeeping system" or "provides . . . a plan . . . for establishing and maintaining a computerized traffic safety recordkeeping system." § 402(k)(4). It further provided:

> Notwithstanding any other provision of law, if a report, list, schedule, or survey is *prepared by or for* a State or political subdivision thereof under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey.

23 U.S.C. § 402(k)(1) (emphasis added). Having already protected documents "*prepared* . . . under" Section 402, in 1987 Congress enacted Section 409 which extends the same protection to all "reports, surveys, schedules, lists, *or data compiled* for the purpose of . . . Sections 130, 144 and 152 of this title," as well as for "*any* highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds." As the United States Solicitor General thereafter noted: "In enacting Section 409, Congress recognized that state highway departments, as well as private entities such as railroads, are reluctant to compile detailed and accurate information about highway safety problems if there

is a significant risk that the information will be used against them in actions for damages arising out of highway accidents." *See* Brief for the United States as *Amicus Curiae* at 12, *State of Alabama Highway Dept. v. Boone*, No. 90-1412 (U.S. 1991) (emphasis added).

B. Congress Strengthens Section 409 Protection

Though the cooperative traffic safety program became popular with state and local governments, some courts tried to limit Section 409 by ruling it did not bar civil *discovery* of the identified documents in damage suits against states for traffic accidents. *See* e.g. *Ex parte Alabama Highway Dept.*, 572 So.2d 389 (Ala.1990), *cert. denied*, 502 U.S. 937 (1991). In response, the United States requested this Court grant certiorari and reverse because "[i]f reports and data concerning potential highway safety hazards are subject to discovery in tort actions, State and private parties will likely be *deterred from compiling* complete and accurate information about such hazards" and "[a]s a result, information about safety programs—which depend on information about safety problems supplied by the States and private entities such as railroads—will be jeopardized." *See Palacios v. Louisiana and Delta Railroad Inc.*, 740 So. 2d 95, 98 n. 6 (La. 1999) (quoting Brief for the United States as *Amicus Curiae* at 10, *State of Alabama Highway Dept. v. Boone*, No. 90-1412 (U.S. 1991) (emphasis added). More significantly, Congress itself responded in 1991 by amending Section 409 to make clear the protected documents could not be "subject to *discovery or admitted* into evidence in a Federal or State court proceeding." *See* 23 U.S.C. § 409 (prior to 1995 amendment). Thereafter the "clear weight of authority" held that "all records *used or usable* in identifying, evaluating or planning safety of highway or rail-highway crossings pursuant to Sections 130, 144, and 152 are so immune to examination." *Seaton v. Johnson*, 898 S.W.2d 232, 235-37 (Tenn. App. 1995) (emphasis added). *See also* cases cited *infra* at n. 3.

However, ignoring the history and language of Section 409, a minority of courts next refused to apply the statutory privilege to "accident reports" or other "raw data collected by" state governments for the federal program. *See Wiedeman v. Dixie Electric Membership Corp.* 627 So.2d 170, 173 (La. 1993), *cert. denied*, 511 U.S. 1127 (1994). *See also S. Pac Transp. Co. v. Yarnell*, 181 Ariz. 316, 890 P.2d 611, 614 (1995) (§ 409 protects only "documents described and *prepared* under the authority of §§ 130, 144 and 152, and no others.") (emphasis added); *Kitts v. Norfolk & W. Ry*, 152 FRD 78, 81 (S.D. W.Va. 1993) (refusing to protect "documents or data prepared or compiled for some entirely separate and distinct purpose" even if later compiled for the federal program). Accordingly, the states' representatives in Congress—including a near unanimous Washington State delegation, *see* Roll Call 679, H.R. 2274, 104th Cong. (Sept. 20, 1995), *available at http://clerkweb. house.gov/cgibin/vote.exe?year=1995&rollnumber=679*; Roll Call 582, S. 440, 104th Cong. (Nov. 17, 1995), *available at http://www.senate.gov/legislative/vote1041/vote_00582.html* — responded by yet again *overwhelmingly* approving an amendment of Section 409 to add the words "or collected" and this time expressly explained:

> This clarification is included in response to recent State court interpretations of the term "data compiled" in the current section 409 of title 23. It is intended that *raw data* collected *prior to being made part* of any formal or bound report *shall not be subject to discovery or admitted into evidence* in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or discussed in such data.

Act of November 18, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N. (109 Stat.) 591 (emphasis added). *See also* cases cited *infra* at n. 3. Thereafter, until the instant case, "[e]very court that has considered the privilege, both federal and state, has concluded that it serves the legitimate purpose of fostering the *collection* and evaluation of highway safety information free from the threat of future tort actions." *Palacios v. Louisiana and Delta Railroad*, 775 So.2d 698, 701 (La.App. 2000) (quoting *Gaubert v. Denton*, 1999 WL 350103 (E.D.La. May 28, 1999) *aff'd* 210 F.3d 368 (5th Cir. 2000))(emphasis added). *See* also cases cited *infra* at 27-30.

By 1996, the USDOT reported to Congress that just the hazard elimination program (i.e. 23 U.S.C. § 152) alone had obligated $4.58 billion, implemented 33,500 projects nationwide, and "helped to prevent more than 26,500 deaths and 760,000 nonfatal injuries since 1974." U.S. Dept. of Trans., *1996 Annual Report on Highway Safety Improvement Programs*, at IV-3, IV-5 (Apr. 1996). Though by that year deaths in highway accidents had indeed dropped to 15.86 for every 100,000 people, nevertheless 42,065 people still were killed and 3,483,000 still injured in highway accidents. *See* U.S. Dept. Of Trans., *1999 Status of the Nation's Highways, Bridges and Transit: Conditions And Performance*, at 5-4.

C. Pierce County Applies For Cooperative State Safety Funds And Protection

In May of 1995, Pierce County—a political subdivision of the State of Washington—applied through its Public Works Department (hereinafter "Public Works") for federal hazard elimination funds under 23 U.S.C. Section 152 for one of its intersections. *See Guillen v. Pierce County*, 144 Wn.2d 696, 31 P.3d 628, 633 (2001). Its application was supported by the required data from accident reports, collision diagrams and other similar material that it had collected and compiled pursuant to that statute. *See* J.A. 21-25, 39-40, 52, 81-83. The "accident reports" all had been generated pursuant to the federal standards set under the Highway Safety Act of 1966 and practically all produced as the result of investigations by the Washington State Patrol and not the Pierce County Sheriff. *See* Cert. Pet. Reply Br. App. "K" at 4-5; J.A. 47,

53-54, 75-78; WAC 136-28 *et seq*. Public Work's collection of accident witness statements likewise had been exclusively obtained from the state, *see* 10/16/98 Hamilton Aff., at 2; WAC 136-28-020, while collision diagrams were generated by both the State Patrol and Public Works officials. *See* J.A. 47, 53, 75. The remaining supporting documents were generated solely by or to Public Works for exclusively roadway safety purposes. *Id*. at 39, 53. The County's request for federal funds was then submitted to and administered by the Washington State Department of Transportation, which thereafter determined the intersection data did not warrant federal hazard elimination funds. *See* J.A. 82. Nevertheless, the next fiscal year of 1996 the County applied to the state again. *Id*. However, while its second application was pending, Clementina Guillen-Alejandre on July 5, 1996 negligently ran a stop sign at the subject intersection causing her pick up truck to collide with another car—killing Guillen-Alejandre and injuring to some degree her two daughters and two nieces who were her passengers. *See* J.A. 14-15. Three weeks later, the County's application for federal funds was granted. J.A. 24, 82.

Later that month Ignacio and Mariano Guillen—guardians for the minor passengers of Guillen-Alejandre—began settlement negotiations with representatives of her estate. Their settlement ultimately lead to an agreement that the Guillens would nevertheless pursue "joint and several liability" in "any future action against Pierce County."[1] *See* Attach. to

[1] Washington municipalities have little protection in road lawsuits. The state legislature has waived sovereign immunity, *see* RCW 4.92.090; RCW 4.96.010, while the Washington Supreme Court has struck down as unconstitutional tort reform legislation that attempted to place a cap on damage awards. *See Sofie v. Fibreboard Corp*., 112 Wn.2d 636, 771 P.2d 711 (1989). Further, defendants can be held wholly responsible for all damages caused by other party defendants if a fault free plaintiff proves the defendant contributed in some small degree to the accident—no matter how minor. *See e.g. Price v. Kitsap Transit*, 125 Wn.2d 456, 886 P.2d

10/23/98 Aff.: Mullineux Dep., at 12 and ex. "1" pp. 1-2 thereto. Accordingly, on August 16, 1996, a law firm retained by Ignacio Guillen wrote to the Pierce County Risk Management Department demanding disclosure of the subject intersection's accident history. *See* J.A. 29. On September 9, 1996, counsel for the County "respectfully den[ied]" this demand and explained that the state's Public Disclosure Act (*i.e*. RCW 42.17.310 (1)(j)) exempts from disclosure any document that would not be available under the rules of discovery, that the requested accident history was compiled for the federal hazard elimination program and that as such it was exempt from discovery under Section 409. *See* J.A. 30-31. Nevertheless, on October 28, 1996, Guillen's counsel expanded the demand to include "all documents that record the accident history that *may have been used in the preparation* of any" federal application. *See* J.A. 32 (emphasis added). Again, the County denied the request and explained that accident history "used in preparation" of applications for Section 152 funds are expressly protected by Section 409 and that this material was compiled by Public Works "for the sole purpose of identifying evaluating or planning the safety enhancement of potential accident sites, hazardous roadway conditions or for developing highway safety construction improvement projects." *See* J.A. 34.

556 (1994). *See also Bunting v. State*, 87 Wn. App. 647, 654, 943 P.2d 347 (1997) (Court of Appeals criticizes misuse of settlement with a defendant driver in an "attempt to manipulate the system in an effort to obtain payment from the State for [a driver's] fault.") Even some members of the state high court have acknowledged it is "rejecting the traditional scope of a municipality's duty in the design and maintenance of roadways" and "opens the door to . . . unreasonable burdens" on municipalities. *See Keller v. City of Spokane*, 44 P.3d 845, 856 (2002) (Johnson, J. dissenting).

D. Washington Courts Refuse To Enforce Section 409 Protection

In December of 1996 Ignacio Guillen, as the husband of Guillen-Alejandre, filed a "Complaint to Require Public Disclosure of Documents" which sought materials pertaining to, among other things, the accident history at the subject intersection. J.A. 6-9. Because those materials were gathered and maintained by the County for the purpose of applying for federal highway safety funds, the County moved for summary judgment on the grounds of 23 U.S.C. § 409. *See* J.A. 10-12, 39, 41-42, 75-76; 6/26/97 Mot. for S.J. The trial court however ordered disclosure, *see* Cert. App. "C," explaining:

> [If the] policy of this state is to deny citizens information about which is required by law to be prepared about accidents at intersections, the court of appeals is going to have to tell me that. I just don't think that's the policy of this state. I understand the competing policies, but that's my decision.

See 10/31/97 VT at 8-9. The County immediately obtained review by the Washington State Court of Appeals. *See* 11/14/97 Notice of Appeal.

A few months later, on April 14, 1998, Ignacio Guillen (now on behalf of his daughters) and Mariano Guillen (on behalf of Guillen-Alejandre's nieces) filed a personal injury suit against Ignacio's wife's estate (despite the settlement) and Pierce County seeking joint and several liability for Guillen-Alejhandre's running of the stop sign. *See* J.A. 13-15. Toward this end, plaintiffs served requests for production and interrogatories on the County—seeking both production of the same documents whose availability under the public disclosure act was being appealed as well as disclosure of the *information* contained therein. *See* Cert. Pet. Reply Br., App. "K;" 31 P.3d at 634-35. Plaintiffs also sought disclosure of these same documents from the State Patrol. *See* 10/7/98 Mot. For Prot. Order. The County again objected pursuant to Section 409, *see id.*, and in response plaintiffs moved the trial

court to compel production explaining that "by gathering evidence about the numerous accidents occurring at this intersection, plaintiffs are trying to establish that the *County had notice* of this hazardous condition *and failed to make improvements*." *See* 9/29/98 P's Mem. To Comp., p. 14 (emphasis added). Though the County moved for a protective order to prevent its collection of safety data from being used against it, *see* 1/8/98 Mot. For Prot. Order, the trial court denied the motion and instead granted plaintiffs' motion to compel. *See* Cert. App. "D" & "E." In ordering production, the trial court explained:

> . . . as long as in this state there exists the viable tort of negligent maintenance of hazardous road condition, discovery of governmental entities [sic] *knowledge of accidents* at a particular intersection are [sic] certainly relevant discovery. I don't believe that tort has been immunized or [sic] nor do I believe that information of prior accidents is privileged. I agree with [the trial judge in the then pending public disclosure case] with regard to his reading of [the] federal statute.

See 10/29/98 VT at 3 (emphasis added). *See* also Cert. App. "F;" J.A. 87. The Washington Court of Appeals thereafter granted discretionary review and consolidated review with the pending public disclosure appeal because "the majority of other jurisdictions reporting appear to support the County's interpretation of 23 U.S.C. § 409." *See* Cert. App. "G" at 4-5. Nevertheless, on August 6, 1999, the Court of Appeals essentially affirmed the trial courts' orders compeling disclosure and discovery, holding the County must produce 4 out of the 5 previously compelled categories of documents. The appellate court held these documents were discoverable because—though it found Section 409 protects accident reports "as collected by the road department"—it also decided the statute does not protect those same documents "in the hands" of the County Sheriff because it concluded Section 409 "does not protect reports collected for

other purposes." *See Guillen v. Pierce County*, 96 Wn.App. 862, 871-72, 982 P.2d 123 (1999). Further, though it did not decide the issue "because neither party has raised or briefed [the] question," the Court of Appeals also *sua sponte* concluded:

> It is arguable that Congress lacks the authority to dictate rules of discovery and rules of admissibility for use in state court. In particular, it is at least arguable that Congress lacks the authority to tell this state, or any state, that it "shall not" disclose or admit, in state court litigation, "reports . . . or data compiled or collected" by a state agency (*e.g.* Pierce County's Public Works Department).

Id at 875 n. 26; Cert.App. "H." The County then sought discretionary review to the Washington Supreme Court for both factual[2] and legal[3] error by the Court of Appeals. *See*

---

[2] The record is undisputed that most accidents at the intersection were investigated *by the state patrol* and *not* the County Sheriff, and there was no evidence the materials were "in the hands" of *any* County agency other than Public Works. *See* Cert. Pet. Reply Br., App. "K" at 4-5; J.A. 47-48, 53-54, 56; 10/8/98 Hamilton Aff, Ex. "C" at 1-2; WAC 136-28 *et seq.* Further, plaintiffs thereafter admitted their intent actually is to obtain "discovery of certain information controlled by the *Pierce County Public Works Department.*" 2/7/00 S.Ct.Supp. Br., p. 1 (emphasis added). Plaintiffs' public disclosure demand expressly seeks "all documents that record the accident history that *may have been used in the preparation* of any" federal application—which is assembled *only by Public Works*. J.A. 32. Plaintiffs' likewise admitted discovery in the civil suit was pursued so they could "establish that the County *had notice* of this hazardous condition and *failed to make improvements*," 9/29/98 P's Mem. To Compel., p. 14 (emphasis added)—again, a function only of *Public Works*. Finally, the trial court ordered production precisely because it concluded "governmental entities [sic] *knowledge of accidents* at a particular intersection are [sic] certainly relevant discovery." *See* 10/23/98 VT, at 3.

[3] The County Sheriff and Public Works Departments are not different entities under Washington law: both are simply parts of the single legal entity "Pierce County." *See* Wash. Const. Art. XI §§ 1, 4 & 5; RCW 4.28.080(1). Therefore the federal privilege as interpreted by the Court of

generally 9/16/99 Pet. For Disc. Review. On January 5, 2000, the Washington Supreme Court granted review, *Guillen*

Appeals would be meaningless for any government having both law enforcement and roadway responsibilities. Further, Section 409 states the documents are protected without limiting that protection only to documents *created* by—or requiring they be *exclusively compiled* by—a *particular* "department." Indeed, this honorable Court holds in the public disclosure context that "compiled" includes documents "generated on an earlier occasion and for a different purpose." *John Doe Agency v. John Doe Corp*, 493 U.S. 146, 155 (1989). *See infra* at 39. Finally, the majority of courts before and after the 1995 amendment hold such documents are protected even where they were "available for other uses and purposes" because "the statute's mandatory language requires exclusion of such evidence at trial." *See Robertson v. Union Pacific R.R. Co.*, 954 F.2d 1433, 1435 n. 3 (8th Cir. 1992)(excluding newspaper article and traffic count). *See also e.g. Ex parte Alabama Dept. of Transp.*, 757 So.2d 371, 374 (Ala. 1999) ("In light of the amendment to the language of §409 and Congress' s stated intent behind the amendment," information from accident reports supplied by one state agency could not be compelled from another state agency that later collected it); *Palacios*, 740 So.2d at 102 (raw data such as "accident reports" and accident histories, "whether from the [state Department of Transportation and Development] or the Louisiana Highway Safety Commission's federally funded accident information data base, is privileged.") *Fry v. So. Pacific Trans. Co.*, 715 So.2d 632, 637 (La. App. 1998)(1995 amendment "clarified that the list of exhibits to be excluded should also encompass accident reports . . . ."); *Reichert v. State*, 694 So.2d 193 (La. 1997) (applying statute to documents not created for federal purposes); *Mackie v. Grand Trunk Western R.R. Co.*, 544 N.W.2d 709, 711 (Mich. Ct. App. 1996)("a document that otherwise falls within the ambit of § 409 must be considered inadmissible even though it fulfills a state as well as a federal function."); *Seaton v. Johnson*, 898 S.W.2d 232, 235-37 (Tenn. Ct. App. 1995) (before the 1995 amendment accident reports protected by the "clear weight of authority" under §409 because "all records *used or usable* in identifying, evaluating or planning safety of highway or rail-highway crossings pursuant to Sections 130, 144, and 152 are so immune to examination.") (emphasis added); *Lusby v. Union Pacific R.R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993)(data from accident reports excluded because "state materials *do not fall outside the scope of §409* merely because they are not compiled *solely for federal reporting purposes and are available for other uses.*") (emphasis added).

v. Pierce County, 139 Wn.2d 1015, 994 P.2d 847 (2000), and thereafter requested supplemental briefing on the constitutional issue raised by the Court of Appeals. *See* 4/9/00 Order.

On September 13, 2001, the Washington Supreme Court ruled that the Court of Appeals analysis was "unsound in principle and unworkable in practice," held the documents at issue "would appear to be covered by § 409" and that "Congress clearly intended that the § 409 privilege preempt state laws and court rules." 31 P.3d 644-47. However, it also ruled that private parties have standing to assert "state's rights" even though "state officials oppose the challenge." *Id* at 648. Further, the Court held that Section 409 violates the Tenth Amendment to the United States Constitution because: 1) under the Spending Clause there is "no valid federal interest" that "is reasonably served" by the privilege, *id* at 651; 2) under the Commerce Clause the "privilege lacks the requisite nexus to § 409's *raison d'etre*," *id*. at 654; and 3) under the Necessary and Proper Clause "it was neither 'necessary' nor 'proper' for Congress" to create the pri[illegible]ge. *Id*. Washington's highest court then adopted t[illegible]y view of the 1991 version of Section 409 (a misinv[illegible]n the Court admitted Congress intended to overr[illegible] 1995 amendment) and held only documents "[illegible]ly 'compiled'—*i.e.* created, composed, recorded" as part of the application process—are protected. *Id*. at 655. Hence the Court held Ignacio Guillen was "entitled to at least four of the five items to which he was denied access," the County was liable for plaintiff's attorney's fees, and that "[i]f this state court has misconstrued the United States Constitution's limitations upon the federal government's power . . . the United States Supreme Court will so instruct, as is its constitutional role under our federalist system of government." *Id*. at 655-56.

SUMMARY OF ARGUMENT

23 U.S.C. Section 409 protects certain documents "compiled or collected" in connection with federal highway safety programs from being discovered or admitted in federal or state suits "for damages arising from any occurrence at a location mentioned or addressed" in those documents. Though *Guillen v. Pierce County*, 144 Wn.2d 696, 31 P.3d 628 (2001) holds the statute violates "states rights," such is contrary to this honorable Court's decisions, jeopardizes an essential cooperative federal/state program and undermines the balance between state and national governmental power established by the Constitution.

First, contrary to the state court's analysis, *Guillen* raises no Tenth Amendment issue. Rather, that amendment imposes structural rather than substantive limits on Congress, *see e.g. Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985), and in any case does not apply to state court enforcement of federal privileges such as Section 409. *See* e.g. *Printz v. United States*, 521 U.S. 898, 928-29 (1997). Further, "states rights" cannot be asserted by private individuals where their state's legislative and executive branches expressly approve and accept the benefits and terms of the challenged federal statute. *See Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 144 (1939).

Second, the *Guillen* decision wrongly strikes down Section 409 despite the fact it falls well within Congress' enumerated powers. Under the Spending Clause, Section 409 honors state sovereignty because compliance with the underlying federal program "remains the prerogative of the States not merely in theory but in fact," *see South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987), and the citizens of Washington have made the ultimate decision through their state legislature, state executive and state delegation to Congress that they accept the federal protection and terms of that federal statutory scheme. *See supra* at 3, 6 & 8. Further, the privilege

"is related to a valid federal interest (inasmuch as 23 U.S.C. § 409 encourages participation in a scheme that ensures, by prioritization, deliberative spending of federal funds)." *See e.g. Palacios v. Louisiana and Delta Railroad*, 775 So.2d 698, 703 (La.App. 2000). Under the Commerce Clause there admittedly is "a sufficient nexus . . . between interstate commerce and the Federal-aid highway system to justify the 'regulatory scheme when considered as a whole,'" *Guillen*, 31 P.3d at 654 (quoting *Hodel v. Indiana*, 452 U.S. 314, 329 n. 17 (1981), and the entirety of such a scheme is valid "even if some of its provisions were not directly related to the purpose of fostering interstate commerce." *FERC v. Mississippi*, 456 U.S. 742, 757 n. 22 (1982). In any case Section 409 is so "directly related" because without it information upon which the cooperative state traffic safety program relies "will be jeopardized." *See Palacios v. Louisiana and Delta Railroad Inc.*, 740 So.2d 95, 98 n.6 (La. 199) (quoting amicus brief in *Ex parte Alabama Highway Dept.*, 572 So.2d 389). Indeed, the protected data exists in its present form expressly because of the federal statutory scheme. *See* WAC 136-28-010. Finally, under the Necessary and Proper Clause, the state court cannot strike down Section 409 simply because it deems the privilege unnecessary. Rather, "[u]nder the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *See Ferguson v. Skrupa*, 372 U.S. 726, 728-29 (1963).

Accordingly, the Supremacy Clause requires state courts to enforce Section 409 as written. The language, history and purpose of that statute do not allow discovery and admission of the documents ordered to be produced here. Further, such considerations make clear the statute not only protects these documents and the fact they were collected, but also protects against the forced disclosure from states or third parties of the information contained within those collected documents. *See*

e.g. Harrison v. Burlington Northern Rail Co., 965 F.2d 155, 160 (7th Cir. 1992); *Rodenbeck v. Norfolk and Western Ry. Co.*, 982 F.Supp. 620, 622-25 (N.D. Ind. 1997).

ARGUMENT

A. "States Rights" And The Tenth Amendment Are Not At Issue.

In sustaining a "federalism challenge" to 23 U.S.C. Section 409, the Washington Supreme Court in *Guillen v. Pierce County* declares the federal statute unconstitutional under the Tenth Amendment. 31 Wn.2d at 648 (citing "a renewed commitment to enforcing the principle of dual sovereignty implicit in the American constitutional framework and made explicit in the Tenth Amendment.") *See* also *id.* at 656 (noting the majority holds "§ 409 exceeds Congress' authority under the Tenth Amendment") (Madsen, J., concurring). Of course, plaintiffs did not in the first instance "challenge" the statute on "federalism," Tenth Amendment, or any other supposed Constitutional ground, but had those issues thrust upon them by Washington's appellate courts. *See* 31 P.3d at 646-47 (limits of Congressional power "raised by the Court of Appeals itself in the final footnote of its *Guillen* opinion."); 96 Wn.App. at 875 n. 26 ("neither party has raised or briefed" constitutionality.) *See* also 4/9/00 Order. Nevertheless, this case does not concern "state rights" because the Tenth Amendment is inapplicable.

1. *Tests For Tenth Amendment Violation Are Not Met*

First, this Court has not overruled its decisions holding that "Tenth Amendment limits on Congress' authority to regulate state activities . . . are *structural, not substantive*—i.e., that States must find their protection from congressional regulation *through the national political process*, *not* through judicially defined spheres of unregulable state activity." *See South Carolina v. Baker*, 485 U.S. 505, 512 (1988) (emphasis-

added). *See also Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985) ("the fundamental limitation that the constitutional scheme imposes . . . is one of process rather than one of result.") Hence, where "the national political process did not operate in a defective manner, the Tenth Amendment is not implicated." *See Baker*, 485 U.S. at 513. *See also Garcia*, 469 U.S. at 554. Here, as in *Baker*, plaintiffs cannot claim their state "was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." 485 U.S. 513. *See also e.g. Claspill v. Miss. Pac. R.R. Co.*, 793 S.W.2d 139, 141 (Mo. 1990) ("Appellant's tenth amendment argument fails" against §409 because "there is no argument that Missouri has been deprived of any right to participate in the political process.") Indeed, the 1995 amendment to Section 409 struck down by the Washington court was enacted with the help and support of Washington's Congressional delegation. *See supra* at 6. Because Section 409 is in every way a *benefit* and not a *burden* to states—it was enacted by their representatives "in the national political process" to *protect* them and is enthusiastically *used by* them—numerous other states also have understandably appeared as Amici in support of reversal. *See* Cert. Amicus Brief of Louisiana; Cert. Amicus Brief of Alaska, et al. Further, contrary to the Washington court's disregard for any federal interest in Section 409, nothing in this Court's decisions "or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation." *Baker*, 485 U.S. at 513.

Additionally, this Court's more recent treatment of alleged Tenth Amendment violations also is not met here because Section 409:

> . . . does not require the States in their sovereign capacity to regulate their own citizens. The [statute] regulates the States as the owners of databases. It does not require the [State] Legislature to enact any laws or regulations, and

> it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.

Reno v. Condon, 528 U.S. 141, 151 (2000) (federal protection of state drivers license data unobjectionable under Tenth Amendment.) The Tenth Amendment does not bar state judicial enforcement of the federal evidentiary privilege of Section 409 because such only operates on *state judges* to prevent *their* use of court compulsion to *compel states* to produce and use data protected for the benefit of that state.

2. *Tenth Amendment Does Not Allow State Courts To Reject Federal Prescriptions*

Second, whatever limitation the Tenth Amendment is deemed to impose on Congressional authority, it does not bar the *enforcement* of federal privileges in *state courts*. Rather, this Court holds *under the Tenth Amendment*:

> Although Congress may not require the legislative or executive branches of the States to enact or administer federal regulatory programs, [citations omitted], it may *require state courts* . . . "to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power." [Citation omitted].

Alden v. Maine, 527 U.S. 706, 752 (1999) (emphasis added). *See also Printz v. United States*, 521 U.S. 898, 907 & 935 (1997) ("state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause"); *New York v. United States*, 505 U.S. 144, 178-79 & 188(1992) ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause."); U.S. Const. Art. VI, cl. 2 ("The Laws of the United States . . . Shall be the supreme Law of the Land; and the *Judges in every State shall be bound thereby*, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding") (emphasis added). Here both

Washington's legislative and executive branches accept the Section 409 privilege, and enforcing such a discovery and evidentiary privilege undeniably "relate[s] to matters appropriate for the judicial power."

Indeed, *FERC v. Mississippi*, 456 U.S. 742, 760 (1982) rejects a Tenth Amendment challenge to federal legislation that requires state "authorities to adjudicate" pursuant to a federal statute because such "is the very type of activity customarily engaged in by the" adjudicatory entity there involved. As this Court there noted:

> Any other conclusion would allow the States to disregard both the preeminent position held by federal law throughout the Nation, *cf. Martin v. Hunter's Lessee*, 1 Wheat. 304, 340-341 (1816), and the congressional determination that the federal rights granted by [federal statute] *can appropriately be enforced through state adjudicatory machinery*. Such an approach, *Testa [v. Katt*, 330 U.S. 386, 389 (1947)] emphasized, "flies in the face of the fact that the States of the Union constitute a nation," and "disregards the purpose and effect of Article VI of the Constitution."

456 U.S. at 760-61 (emphasis added). In that Congressional *abolition* of a certain type of state tort by a mere *federal regulation promulgated pursuant to 23 U.S.C.* has been held constitutional, *see Norfolk Southern Railway v. Shanklin*, 529 U.S. 344 (2000) (regulation enacted under 23 U.S.C. Sec. 130 preempted state tort action for negligent maintenance of grade crossing), it is difficult to understand how 23 U.S.C. Section 409's express *statutory provision* only of a discovery and evidentiary *protection* in a *specific and limited type* of state tort can be unconstitutional under the Tenth Amendment or any other constitutional provision.

3. *Plaintiffs Cannot Assert "States Rights"*

Finally, individuals simply lack standing to assert the Tenth Amendment absent their state or its officials. To the

extent the *Guillen* case relies on principles of "*state* sovereignty," *see e.g.* 31 P.2d at 655 (emphasis added), a plaintiff "generally must assert his *own* legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). In *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 144 (1939), this honorable Court held that "absent the states or their officers, [individuals] have no standing . . . to raise any question under the [tenth] amendment." Here Washington State is not only absent from any challenge to Section 409, but has actively joined as amicus *in support of Section 409's constitutionality* in both the state court and—along with a dozen other states—in this Court. *See* 10/24/00 Wash. Amicus Br.; Cert. Amicus Br. Of Alaska *et al.* It has accepted and administered Section 409's benefits, *see e.g.* J.A. 21-23, 40; RCW 47.04.050-.070, and its Congressional delegation helped enact Section 409 to begin with. *See supra* at 6. The Washington court however refuses to consider such precedent or facts and instead expressly grants plaintiffs "standing" to raise—or, as here, have the *court raise for them*—such "federalist grounds, even when not joined by a state government." 31 P.3d at 648. The state court justifies doing so because other courts have "explicitly or implicitly" allowed Tenth Amendment challenges by individuals and because "dicta" from *New York v. United States*, 505 U.S. at 181-82, states that "departure from the constitutional plan cannot be ratified by the 'consent' of state officials." 31 P.3d at 648.

However, the cases cited by *Guillen* as "explicitly or implicitly" allowing individuals to make Tenth Amendment challenges, 31 P.3d at 648, either are decisions of this Court that *do not* discuss standing *and* predate *Tennessee Electric Power Co.*, *see Chas C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937), or are exclusively Eleventh Circuit cases which themselves question the correctness of the position cited. *Compare*

Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030, 1034 n. 6 (11th Cir. 1992)("admitted doubts" that individuals "have standing to advance this Tenth Amendment claim."); *Atlanta Gas Light Co. v. U. S. Dept. of Energy*, 666 F.2d 1359, 1368 (11th Cir. 1982) ("express[ing] our uncertainty about whether the petitioners have standing to raise the Tenth Amendment question.") *with Nance v. Environmental Protection Agency*, 645 F.2d 701, 716 (9th Cir.1981) ("insofar as the Tenth Amendment is designed to protect the interest of states qua states," standing of private party "may be seriously questioned"); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 761-62 (10th Cir. 1980), *cert. denied*, 450 U.S. 1050 (1981) (only state attorney general has standing to assert Tenth Amendment challenge and it "flatly contradicted" plaintiff's claims); *Vermont Assembly of Home Health Agencies Inc. v. Shalala*, 18 F.Supp. 2d 355, 370-71 (D.Vt. 1998) (no Tenth Amendment standing where state opposed).

As to *Guillen*'s reliance on *New York v. United States*, there the *only* plaintiff *was the state*—an individual's standing was never discussed, indeed the word "standing" is nowhere used—and the cited statement was only made in rejecting an assertion the state had *waived* its Tenth Amendment right by lending its "support to the Act's enactment." Nowhere does *New York* discuss—much less overrule—this Court's holding in *Tennessee Electric Power Co.* Rather, this Court has made clear that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Courts of Appeals should follow the case that directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Ouijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 484 (1989).

Washington courts stand alone in holding this eagerly accepted federal benefit to states is unconstitutional because it is inconsistent with "the policy of this state." *See* 10/31/97 VT at 9. *See also* 96 Wn.App. at 875 n. 26; 31 P.3d at 655. However, this Court has made clear no state court can refuse to enforce federal law on the ground "the act of Congress is not in harmony with the policy of the State . . ." *Testa*, 330 U.S. at 392-93. For these reasons, there is no basis for declaring Section 409 unconstitutional under the Tenth Amendment.

B. Congress' Enumerated Powers Authorize Section 409

In striking down Section 409, the state court did not rely on any supposed constitutional right to court created rules—presumably because this Court has:

> . . . clearly established that "[a] person has no property, no vested interest, in any rule of the common law." *Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912), quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877). The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," *Silver v. Silver*, 280 U.S. 117, 122 (1929), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). *See* also *Arizona Employers' Liability Cases*, 250 U.S. 400, 419-422 (1919).

Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88 n. 32 (1978)(upholding constitutionality of Congressional imposition of liability ceiling for particular type of tort). *See also e.g. Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000)(state common law "no airbag" action statutorily preempted). Rather, the *Guillen* case "evaluate[d] whether Congress acted outside its enumerated powers when it amended 23 U.S.C. § 409 in 1995," 31 P.3d at 649, and concluded "its 1995 amendment of that statute cannot be characterized as a valid exercise of any power constitutionally delegated to the federal government." *Id.* at 655.

In analyzing the constitutionality of a federal statute, this Court holds: "We of course begin with the time-honored presumption that the [federal statute] is a 'constitutional exercise of legislative power.'" *Reno v. Condon*, 528 U.S. at 148 (quoting *Close v. Glenwood Cemetery*, 107 U.S. 466, 475 (1883). *See* also *INS v. Chadha*, 462 U.S. 919, 944 (1983). As demonstrated below, nothing in *Guillen's* analysis of the enumerated powers of Congress comes near to overcoming the presumed constitutionality of Section 409.

1. *Spending Clause Authorizes Section 409 Privilege*

The "Spending Clause," Article I, Section 8, clause 1, empowers Congress to "provide for the . . . general Welfare of the United States," and is held to authorize legislation affecting even state legislatures and executives. Hence, in *New York v. United States*, 505 U.S. at 173, this Court found where Congress "conditioned grants to the States upon the States' attainment of a series of milestones," it acts "well within the authority of Congress under the Commerce and Spending Clauses." Such Congressional "encouragement," as opposed to "compulsion," was held to honor principles of federalism. This is so because "residents of the State retain the ultimate decision as to whether or not the State will comply" so if "a state's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant." *Id.* at 168. Similarly, in *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987) this Court held that "[e]ven if Congress might lack the power to impose a national minimum drinking age directly, . . . encouragement to state action . . . is a valid use of the spending power" because "the enactment of such laws remains the prerogative of the States not merely in theory but in fact."

a. Section 409 Is Part Of Conditional Program

23 U.S.C. Section 409 applies to raw data collected or compiled "pursuant to sections . . . . 152 of this title, or for the purpose of developing *any* highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds." (Emphasis added). Section 152(a) of Titl 23 provides for states to identify hazardous public roads, w ile Section 152(b) authorizes the federal government to "a[illegible] as a project under this section any highway safety improvement project." Likewise, 23 U.S.C. Section 402(k)(4) conditions a state's eligibility for federal aid highway funds on "if" it either "certifies to the Secretary that it has in operation a computerized traffic safety record-keeping system" or "provides . . . a plan . . . for establishing and maintaining a computerized traffic safety recordkeeping system." Hence, under Sections 152 and 402, Congress conditions grants of federal aid highway funds on a state's attainment of the milestone of having a computerized traffic safety record keeping system and using it to identify potentially hazardous roads.

As an additional incentive to do so, Congress under Section 409 protects records so obtained and kept under the program from discovery or admission in suits involving the road in question. *See e.g. Robertson v. Union Pacific R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992) ("the underlying intent of the statute is to 'facilitate candor in administrative evaluations of highway safety hazards,' *and* to prohibit federally required *record-keeping* from being used as a 'tool ... in private litigation.'") (citing *Duncan v. Union Pac. R.R. Co*, 790 P. 2d 595 (Utah App. 1990), *aff'd*, 842 P.2d 832 (Utah 1992) and *Light v. State*, 149 Misc.2d 75, 560 N.Y.S.2d 962, 965 (N.Y. Ct. Cl. 1990))(emphasis added); *Palacios*, 775 So. 2d at 703 ("23 U.S.C. § 409 *encourages participation* in a scheme that ensures, by prioritization, deliberative spending of federal funds.") (emphasis added); *Coniker v. New York*, 181 Misc.

2d 801, 695 N.Y.S.2d 492, 496 (N.Y. Ct.Cl. 1999) (§ 409 arose out of "the Federal Government's decision to *encourage* States to" collect and compile data "by conditioning Federal funding thereon.") (emphasis added). That compliance with Section 152 is "the prerogative of the States not merely in theory but in fact," and encouraging such compliance was the purpose for Section 409, is shown by the fact that this privilege was created because without it highway departments were "reluctant to [compile information to identify and prioritize roadway hazards] for fear that acknowledging the existence of hazardous conditions would expose them to liability." *See* Louisiana App.: 5/4/83 USDOT Memo. *See* also Br. for U.S. as Amicus Curiae at 10, *State of Alabama Highway Dept.*, No. 90-1412. Of course, should a state government *want* their collection and compilation of raw data to be used against them in road suits they can choose not to apply for roadway hazard elimination funds or their attorneys can choose not to assert the privilege in court.

Indeed the statutory scheme of 23 U.S.C. *et. seq.*—of which Sections 152, 402 and 409 are all a part—has been *upheld* by this Court as constitutional under the Spending Clause and given as an example of a proper exercise of Congressional power. *See Dole*, 483 U.S. at 211-12 (23 U.S.C. § 158 imposing national minimum drinking age is constitutional under the Spending Clause). *See* also *Printz*, 521 U.S. at 936 (O'Connor, J., concurring) (conditions imposed on funds apportioned to the states under 23 U.S.C. § 402—which include the §152(e) hazard elimination funds involved here—are valid under Spending Clause). Further, as noted above, in Washington the citizenry has made the ultimate decision through its state legislature, its state executive and state delegation to Congress that they accept the federal protection and terms of Section 409. *See supra* at 3, 6 & 8.

Nevertheless, though the Washington court admits Section 409 is one of the "strings attached" to its state's willing acceptance of federal aid highway funds, 31 P.3d at 651, that court finds such conditions unconstitutional because:

> We find that no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and 'raw data' that were originally prepared for routine state and local purposes, simply because they were 'collected,' for, *among other reasons*, pursuant to a federal statute for federal purposes.

Id. However, as demonstrated above, the privilege for such "collected" data serves the essential interest of encouraging state participation in the cooperative traffic safety program. As shown below, not only has every other court considering its purpose so concluded, but so too has the Washington Supreme Court and plaintiffs.

b. "Federal Interest" For Section 409 Well Established

The Washington Supreme Court admits Section "152 requires jurisdictions to 'systematically maintain' complete, *ongoing* collections of all accident related materials and data on 'all public roads,'" 31 P.3d at 646, and that:

> By forcing state and local governments to identify all "public roads" that "may constitute a danger to motorists, bicyclists, and pedestrians," and to rank the most hazardous among them in writing, Congress accorded private tort plaintiffs an added advantage in their efforts to prove negligent governmental design or maintenance of certain traffic sites. In 1987, Congress enacted 23 U.S.C. §409 at least in part to address this problem.

Id. at 641 (emphasis added). The state court further concedes Congress "disagreed with such restricted readings given" prior to Section 409's 1995 clarifying amendment by some

state courts—and now resurrected by *Guillen*—that misapplied the privilege only to documents "created" under the federal program. *Id.* at 644, 655. *See also* 1995 U.S.C.C.A.N. (109 Stat.) 591, and cases cited *supra* at n. 3. Indeed, as the United States informed this honorable Court back in 1991:

> In enacting Section 409, Congress recognized that state highway departments, as well as private entities such as railroads, are *reluctant to compile detailed and accurate information* about highway safety problems if there is a significant risk that *the information will be used against them* in actions for damages arising out of highway accidents.

See Br. for U.S. as Amicus Curiae at 12, *State of Alabama Highway Dept. v. Boone*, No. 90-1412 (U.S. 1991) (emphasis added). *See* also *id.* at 10; *supra* at 5-7.

Hence, both before and after its current language was enacted, Section 409 was intended to "remedy this problem" of municipalities not gathering and retaining data as part of the federal application process out of fear "private tort plaintiffs [would have] an added advantage in their efforts to prove negligent governmental design or maintenance of certain traffic sites." Indeed, Section 409 *rectifies* the harmful expansion of state government tort liability *created* by the record keeping requirement. *See generally* Merits Amicus Br. Of Alaska, *et. al.* Both before and after the 1995 amendment, other courts had no problem recognizing this need to encourage states to *obtain and keep* data is the federal interest behind Section 409's discovery and evidentiary privilege. *See e.g. Palacios*, 775 So. 2d at 703 ("23 U.S.C. § 409 *encourages participation* in a scheme that ensures, by prioritization, deliberative spending of federal funds.") (emphasis added); *Coniker,* 695 N.Y.S. 2d at 496 (§ 409 arose out of "the Federal Government's decision to *encourage States* to" collect and compile data "by conditioning Federal funding thereon."); *Reichert v. State of Louisiana*,

694 So.2d 193, 196 (La. 1997) (quoting *Perkins v. Ohio Dept. of Transp.*, 65 Ohio App. 3d. 487, 584 N.E. 2d 794 (1989), *cause dismissed*, 57 Ohio St.3d 612, 566 NE 2d 673, *rehearing denied*, 58 Ohio St.3d 711, 570 N.E. 2d 281 (1991) ("The interest to be served by such legislation is to *obtain* information with regard to the safety of roadways free from the fear of future tort actions.") (emphasis added); *Harrison v. Burlington Northern Rail Co.*, 965 F.2d 155, 160 (7th Cir. 1992)(quoting *Robertson*, 954 F.2d at 1435)("the underlying intent of the statute is to . . . prohibit federally required *record-keeping* from being used as a 'tool . . . in private litigation.'")

Indeed, this recognized "federal interest" in encouraging states to "obtain information" and conduct "record keeping" also has been expressly upheld as "*reasonably related*" to the accident data privilege and a vital part of the cooperative safety program. As the Solicitor General explained over a decade ago, Section 409 is essential to the highway safety program because otherwise "State and private parties will likely be *deterred from compiling complete and accurate information* about such hazards" and "*information about safety programs*—which depend on information about safety problems supplied by the States and private entities such as railroads—will be *jeopardized*." *See Palacios v. Louisiana and Delta Railroad Inc.*, 740 So. 2d 95, n. 6 (La. 1999) (quoting amicus brief in *Ex parte Alabama Highway Dept.*, 575 So. 2d 389 (Ala.1990), *cert. denied*, 502 U.S. 937 (1991)) (emphasis added).

Other state courts long after the 1995 clarifying amendment likewise have explained:

> Congress has determined that the effect of the prohibition would be to enhance the safety of the nation's highways and, in the long run reduce the number of people killed and injured in accidents that could be avoided by systematic analysis, and that this goal

> outweighs the barriers that it creates for litigants attempting to prove that a state's negligence contributed to their injuries.

Coniker, 695 N.Y.S.2d at 495. Indeed, other state courts find Section 409 constitutional under the Spending Clause because:

> [N]obody made [the state] get into the . . . safety enhancement program. It is a voluntary program. Duly authorized officials of this state, however, have committed us to the program—in exchange for ninety percent federal funding—and it does not strike us outrageous that we should accede to the federal government's rules and regulations appertaining thereto.

Sawyer v. Illinois Central Gulf Railroad Co., 606 So.2d 1069, 1074 (Miss. 1992). Hence, as yet another state court explains, Section 409 is valid under the Spending Clause because:

> Congress' intrusion, in this instance, however, is constitutionally permissible because [the state's] participation in the federal funding scheme is voluntary; because the improvement of state highways with federal funds is in pursuit of "[providing] for the general welfare" as provided in U.S.Const. Art. I, §8, cl. 1 ("spending power"); because it is clear that participation in the funding program requires acquiescence to the intrusion; and finally, because *the intrusion is related to a valid federal interest* (inasmuch as 23 U.S.C. §409 *encourages participation* in a scheme that ensures, by prioritization, deliberative spending of federal funds.) *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 2796, 97 L. Ed. 2d 171 (1987).

See Palacios, 775 So.2d at 703 (quoting *Martinolich v. Southern Pac. Transp.*, 532 So.2d 435, 438 (La.Ct.App. 1988), *cert. denied*, 490 U.S. 1109 (1989))(emphasis added).

c. *Guillen* Defeats Reasonably Related Federal Interest

The Washington court's refusal to enforce Section 409 obviously defeats this well established federal interest in state participation in the safety program. Indeed, even plaintiffs' mistakenly narrow interpretation of Section 409—*i.e.* that it somehow does not extend to "keeping a tort plaintiff from using raw data about a traffic intersection that is kept as a matter of course under state law," Br. In Opp. To Cert. at 25—admits to a federal interest that is demonstrably defeated by *Guillen*. In opposing the grant of certiorari, plaintiffs admitted:

> [K]eeping from the jury the fact that the state compiled and collected accident information regarding a certain intersection for purposes of seeking federal funds is appropriate. It is appropriate because if a party in a tort action is allowed to admit into evidence that the state was gathering information about a certain intersection then a jury could reach an inference that the state admitted the intersection was dangerous. This was the danger in which the federal government has an interest.

Id. Using protected documents to "reach an inference that the state admitted the intersection was dangerous" is *exactly* what plaintiffs seek and *exactly* why the trial court compelled production. Plaintiffs' public disclosure demand expressly seeks "all documents that record the accident history that may have been *used in the preparation* of any" federal application. *See* J.A. 32. Likewise, plaintiffs' civil discovery request was described by them as an attempt to use Public Work's collection of such data to "establish that the County had *notice of this hazardous condition and failed to make improvements*." 9/29/98 P's Mem. To Compel., p. 14 (emphasis added). Indeed, the trial court ordered production *precisely because* it concluded "*governmental entities [sic] knowledge of accidents* at a particular intersection are [sic] certainly relevant discovery." *See* 10/23/98 VT, at 3.

Section 409 therefore is a valid exercise of Congressional Spending Clause power that is undermined by *Guillen*.

2. *Commerce Clause Also Authorizes Section 409*

The "Commerce Clause," Article I, Section 8, clause 3, empowers Congress "[t]o regulate Commerce ... among the several States." Such has been held to extend to regulating "the use of the channels of interstate commerce," to regulating and protecting "the instrumentalities of interstate commerce, . . . even though the threat may come only from intrastate activities," and to regulating "those activities having a substantial relation to interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (emphasis added). Here the Washington court admits such encouragement of states to participate in enhancing the safety of roadways across the nation pursuant to Sections 152, 402 and 409 favorably effect "the instrumentalities of interstate commerce" as well as has "a substantial relation to interstate commerce." *See* 31 P.3d at 654 ("Certainly, a sufficient nexus exists between interstate commerce and the Federal-aid highway system to justify the 'regulatory scheme when considered as a whole.'") (quoting *Hodel v. Indiana*, 452 U.S. 314, 329 n. 17 (1981); Br. In Opp. To Cert., at 26-27. *See* also *Claspill v. Miss. Pac. R.R. Co.*, 793 S.W.2d 139, 141 (Mo.), *cert. denied*, 498 U.S. 984 (1990) (challenge to §409 rejected because under Commerce Clause States "are not to create 'judicially defined spheres of unregulable state activity.'")

However, the Washington Supreme Court concludes Section 409 is not an "integral part" of the regulatory program because "we fail to see how those vital federal purposes are reasonably served" by the protection of "materials and data that would exist even had a federal safety enhancement program never been created . . . ." *See* 31 P.3d at 654 (citing *Hodel*, 452 U.S. at 329 n. 17). Such a conclusion misapplies this Court's test in *Hodel v. Indiana,* misstates the purpose of

Section 409 and misunderstands the nature of the "materials and data" collected and compiled here.

a. "Direct Relation" To Federal Goal Not Required

In *Hodel*, appellees similarly asserted—as does the state supreme court here—"that a number of the specific provisions challenged in this case cannot be shown to be related to the congressional goal . . . ." 452 U.S. at 329 n. 17. Yet this Court replied:

> This claim, even if correct, is beside the point. A complex regulatory program such as established by the Act can survive a Commerce Clause challenge *without a showing that every single facet of the program is independently and directly related* to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.

Id. (emphasis added). *See also FERC*, 456 U.S. at 757 n. 22 (federal statute valid under Commerce Clause "even if some of its provisions were not directly related to the purpose of fostering interstate commerce"). Hence: "A court may invalidate legislation enacted under the Commerce Clause *only* if it is clear that there is . . . *no reasonable connection* between the regulatory means selected and the asserted ends." *FERC*, 456 U.S. at 754 (quoting *Hodel*, 452 U.S. at 323-324) (emphasis added). However, "such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel*, 452 U.S. at 331-332. Here, no such showing is possible—much less ever attempted by the state court.

Nevertheless, even if this Court's constitutional jurisprudence were refashioned to now require "every single facet of the program" to be "independently and directly related to a valid congressional goal," Section 409 is so related. *See supra* at 27-31.

b. Data At Issue Exists Because Of Federal Law

Finally, it is neither true nor relevant that supposedly in Washington the protected "materials and data [still] would exist even had a federal safety enhancement program never been created . . . ." *See* 31 P.3d at 654. Rather, in Washington, data such as police accident reports contain the information required by state regulations, and those regulations were enacted in *express compliance with the federal highway safety act*. *See e.g.* WAC § 136-28-010. *See also* Merits Amicus Br. Of Alaska, *et al.* Further, even had the information contained in Washington state's accident reports been totally independent of federal highway safety standards, it has been recognized as "strained and illogical" to argue such would preclude enforcement of Section 409:

> Apparently, claimant would have this court hold that because the State of New York's realization that systematic analysis and prioritization of accident locations was a worthwhile undertaking predated the Federal Government's decision to encourage States to so act (by conditioning Federal funding thereon), section 409, in effect, does not apply in this State, at least with respect to material "compiled or collected . . . pursuant to section[] . . . 152." There is no logical basis for such a strained and illogical interpretation of congressional intent, and the court declines to adopt claimant's reasoning. . . . . [N]othing in the language of § 409 supports the contention that it was only intended to apply to those states that were not enlightened enough to adopt such a program without the federal carrot-and-stick, and indeed its purpose . . . is equally fostered regardless of whether a particular state decided to initiate such a program before or after the federal government became involved.

Coniker, 695 N.Y.S.2d at 496. Therefore Section 409 also is a valid Congressional exercise of its Commerce Clause power.

3. Necessary And Proper Clause Authorizes Section 409

The "Necessary and Proper Clause," Article I, Section 8, clause 18, empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." However, the only consideration the Washington court gave this enumerated power was to summarily conclude "that it was neither 'necessary' nor 'proper' for Congress in 1995 to extend that privilege to traffic and accident materials and raw data created and collected for state and local purposes, simply because they are also collected and used for federal purposes." 31 P.3d at 654-55.

First, as shown above, the 1995 amendment did not "extend" the Section 409 privilege but was a "*clarification* . . . included in response to recent State court" misinterpretations of Section 409. *See* 1995 U.S.C.C.A.N. (109 Stat.) 59; *Reichert*, 694 So.2d at 198 ("clarification was added in response to recent State court decisions, . . . that in the view of Congress, misinterpreted the term 'data compiled.'") (emphasis added); cases cited *supra* at n.3. Second, as also shown above, the Washington court's refusal to acknowledge the essential role of Section 409 in the federal statutory scheme is demonstrably erroneous. *See supra* at 27-31. Third, as demonstrated below, the Necessary and Proper Clause precludes a court from striking down federal legislation simply because a court would have chosen a different means to address a valid federal concern.

Almost two hundred years ago Chief Justice Marshall explained concerning the Necessary and Proper Clause:

> 1st. The clause is placed among *the powers of Congress*, *not* among the limitations on those powers.

> 2nd. Its terms purport to *enlarge*, not to diminish the powers vested in the government. It purports to be an *additional power*, not a restriction on those already granted.

McCulloch v. Maryland, 4 Wheat. 316, 419-20 (1819) (emphasis added). This Court therefore long ago concluded that though "the powers of the government are limited, and that its limits are not to be transcended:"

> [T]he sound construction of the constitution must allow to the national legislature that *discretion*, with respect to the *means by which the powers it confers are to be carried into execution*, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id at 421 (emphasis added). Therefore, it is for *Congress* to "'exercise its best judgment *in the selection of measures*, to carry into execution the constitutional powers of the government,' and 'avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.'" *Id* (emphasis added). *See also e.g. Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976) (that another "scheme would have been wiser or more practical under the circumstances *is not a question of constitutional dimension*.") (emphasis added); *Ferguson v. Skrupa*, 372 U.S. 726, 728-29 (1963)("Under the system of government created by our Constitution, *it is up to legislatures, not courts, to decide on the wisdom and utility of legislation*.")(emphasis added).

As one state court explained in regard to Section 409:

> Our system of government assigns the balancing of such competing interests to the legislative branch, and the role of this court is not to second guess the analysis that

> resulted in this evaluation, or to attempt, in a particular case, to find a way around it, but rather to effectuate congressional intent.

Coniker, 695 N.Y.S.2d at 495. The Washington court, in violation of this principle, *substitutes its judgment* for *Congress' "discretion*, with respect to the means by which the powers [the constitution] confers are to be carried into execution." Though the Washington court relies on Justice O'Connor's dissent in *Dole* to argue Congress cannot condition federal funds on what *Guillen deems* "an attenuated or tangential relationship to highway use or safety," 31 P.3d at 650 n. 34 (citing *Dole*, 483 U.S. at 215) (O'Connor, J., dissenting), the *Dole* court actually *upheld* the constitutionality of the statute and found "any such [undetermined germaneness] limitation on conditional federal grants [was] satisfied" because a uniform drinking age requirement was sufficiently related to the main goal of promoting highway safety—even though it broadly prevented under-aged persons from drinking whether or not they would be driving. *See* 483 U.S. 209 n. 3. Though the protection of collected and compiled raw accident data has been shown *directly related* to the need to encourage state participation in the highway safety program and to rectify its impact on municipal liability, the federal privilege as currently written is *at least* as "germane" to highway safety as the minimum drinking age upheld in *Dole* and *at least* as within Congress' discretion under the Necessary and Proper Clause. *See also* Merits Br. Of *Amicus* Amer. Ass. Of R.R.

C. The Supremacy Clause Requires Enforcement Of Section 409 As Written

By its amendment in 1995, Congress provided in Section 409:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating or planning the

> safety enhancement of potential accident sites, hazardous roadway conditions, or railway/highway crossings, pursuant to Sections 130, 144 and 152 of this title, or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in federal or state court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data.

In their opposition to certiorari, plaintiffs argued the *Guillen* case was mistaken only to the extent "it failed to properly recognize the scope of the Act" and that—as the *Guillen* concurrence argued—the constitutional issues could be avoided by reading Section 409's protection of raw data collected for cooperative state traffic safety purposes as inapplicable where that raw data is also collected "as part of regular state requirements." Resp. Br. In Opp., at 19. *See* also 31 P.3d at 656 (Madsen, J., concurring). However, such neither seeks nor finds support in the rules of statutory construction, the statute's actual language, legislative history or the obvious purpose of Congress.

1. *Section 409 Is Unambiguous And Clearly Applies Here*

This Court holds "the canon of constitutional avoidance has no application in the absence of statutory ambiguity." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001). The *Guillen* concurrence however identifies *no* "ambiguity" in Section 409—much less one that supports excluding from its protection raw data where it supposedly also is collected "as part of regular state requirements."[4]

[4] Neither plaintiffs nor the concurring opinion identify any "*state* requirement" that *Pierce County* collect or compile the raw accident data in question.

Indeed, though the "starting point in every case involving construction of a statute is the language itself," *Kelly v. Robinson*, 479 U.S. 36, 43 (1986)(*quoting Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975), the concurrence in *Guillen* advocates its alternative reading without bothering to address Section 409's actual language. *See* 31 P.3d at 657.

a. Language of Statute Mandates Protection

Section 409's language nowhere states that protected data must be collected or compiled "solely," "only," or "exclusively" for the specified "federal" purposes. Indeed, the statute does not make provision for *any* exception to the privilege—as do for instance the Federal Rules of Evidence when otherwise privileged evidence is "offered for another purpose." *See e.g.* FRE 407, 408, 412. Rather, Section 409 unambiguously provides that so long as "data [is] compiled or collected for the purpose" specified in the statute, it "*shall not be subject to discovery or admitted into evidence* in federal or state court . . . in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data." 23 U.S.C. § 409 (emphasis added). Accordingly, other courts acknowledge Section "409's rather expansive scope," *Rodenbeck v. Norfolk and Western Ry. Co.*, 982 F.Supp. 620, 623 (N.D. Ind. 1997), and hold Section "409 provides a fairly *broad exclusion* . . . ." *Robertson*, 954 F.2d at 1435 (emphasis added). *See also Harrison*, 965 F.2d at 159 ("§409 withdraws the broad latitude of discretion ordinarily allowed judges in evidentiary matters . . . .")

In fact, in a case addressing privileges from disclosure, this Court specifically held "the word 'compile' naturally . . . refer[s] even to the process of gathering at one time records and information that were *generated on an earlier occasion and for a different purpose*." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153-54 (1989) (exemption under the

Freedom of Information Act for records "compiled for law enforcement purposes" included documents not originally so compiled) (emphasis added). Indeed, the Washington Supreme Court's own precedent similarly conflicts with any other interpretation of "compiled." *See Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712, 715 (1997) ("Documents that were created for one 'purpose . . . were not disqualified from being 'compiled' again later for a different purpose.'") There simply "is no logical basis" for the concurring opinion's interpretation because, as noted above, "nothing in the language of §409 supports the contention that it was only intended to apply to those states that were not enlightened enough to adopt such a program without the federal carrot-and-stick . . . ." *Coniker*, 695 N.Y.S.2d at 496.

b. Legislative History Mandates Protection

Nevertheless, even if this Court were to look behind the plain language of Section 409 to its legislative history, no support exists for a reading that excludes raw data when it is also available for state purposes. Congressional intent that the statute *not* be narrowly interpreted is reflected in its repeated willingness to amend Section 409 whenever even a minority of courts attempted a narrow construction. *See* supra at 5-6. More importantly, the alternative reading proposed by the *Guillen* concurrence *directly conflicts* with Congress' express 1995 statement of intent to overrule just such misinterpretations. There Congress explained the current language was enacted "in response to recent State court interpretations of the term 'data compiled'" and that by the amendment it "intended that *raw data* collected *prior* to being made part of any formal or bound report *shall not be subject to discovery or admitted into evidence* in a Federal or State court proceeding . . . ." *See* 1995 U.S.C.C.A.N. (109 Stat.) 59 (emphasis added). Accordingly, such courts as the Louisiana Supreme Court—the same court that *had been* part of the minority by its decision in *Wiedeman v. Dixie Electric*

Membership Corporation, 627 So.2d 170, 172 (La. 1993) that held raw data underlying funding applications was discoverable—thereafter *reversed itself*:

> On November 28, 1995 section 409 was amended to include the words "or collected" after "compiled" *to effectively eliminate the admissibility of '[a]ccident reports, traffic counts, and other raw data collected* by the Department' allowed by the holding in *Wiedeman*. This clarification was added in response to recent State court decisions, like *Wiedeman*, that in the view of Congress, misinterpreted the term 'data compiled.'

Reichert, 694 So.2d at 198 (emphasis added). In fact, the majority of courts even *before* and certainly *after* the 1995 amendment determined Congress had *always* intended to protect raw data created for other purposes and *then* collected for cooperative traffic safety use. *See* cases cited *supra* at n. 3.

c. Legislative Purpose Mandates Protection

Further, the misinterpretation advocated by plaintiffs and the *Guillen* concurrence not only contradicts the clear language and legislative history of Section 409, but *defeats* its purpose. As previously demonstrated, by protecting raw data collected and kept for highway safety purposes, "§ 409 *encourages participation* in a scheme that ensures, by prioritization, deliberative spending of federal funds." *Palacios*, 775 So. 2d at 703 (emphasis added). *See also supra*, at 27-31. Indeed, the language that became Section 409 was first proposed by the USDOT after it learned state "highway departments are reluctant to [compile information to identify and prioritize roadway hazards] for fear that acknowledging the existence of hazardous conditions would expose them to liability." *See* Louisiana App.: 5/4/83 USDOT Memo; Br. for U.S. as *Amicus Curiae* at 10, *State of Alabama Highway Dept.*, No. 90-1412. Any interpretation of Section 409 that does not protect accident raw data originally created for state purposes places Pierce County and other municipalities in a

far worse position than if they had never participated in the federal program. Because the County seeks to obtain federal highway safety funds, its Public Works has become a central location for *all* accident history concerning its roads created by *all* law enforcement—such as the unaffiliated *State* Patrol—that it would not otherwise have collected and compiled. *See* Cert. Pet. Reply Br., App. "K" at 4-5; J.A. 47-48, 53-54, 56; 10/8/98 Hamilton Aff, Ex. "C" at 1-2; WAC 136-28 *et seq*. Absent Section 409 protection, this not only provides plaintiffs a previously unavailable "one stop shopping" for all their discovery needs, but exposes the County to the assertion—being actively pursued here by plaintiffs—"that the County *had notice* of this hazardous condition and *failed to make improvements*." 2/7/00 Supp. Br., at 1 (emphasis added). *See also* 9/29/98 P's Mem. To Compel. at 14; 10/23/98 VT at 3; Merits Amicus Br. Of Alaska, *et al*.

Likewise, the interpretation advocated by plaintiffs and the *Guillen* concurrence also defeats Congressional intent by placing Section 409 on a collision course with itself. The assertion a government may not invoke the privilege where otherwise protected data is also held for purposes other than the highway safety act—such as the *Guillen* case erroneously *supposed*[5] is done by the County Sheriff for law enforcement purposes, 31 P.3d at 658—makes the privilege inapplicable to *every* governmental entity that has both maintenance and law enforcement responsibilities over roadways. Hence, such an interpretation *excludes* most, if not all, states and local municipalities from the privilege and makes Section 409 meaningless. This obviously defeats Section 409's underlying purpose of encouraging participation in the safety program.

---

[5] Again, the record instead demonstrates most of the accidents in question were investigated by the State Patrol and not the County Sheriff, and that no County entity other than Public Works collected those reports. *See supra* at n. 2.

Finally, the interpretation proposed by plaintiffs and the *Guillen* concurrence fails to acknowledge that the purpose of Section 409—*i.e.* encouraging states to fully participate in the cooperative safety program and its record keeping functions (that are "basic to ultimate success" of the entire program) and to remedy its creation of liability problems for municipalities—is affirmatively *advanced* by protecting raw data even where it also is collected by its law enforcement agencies. A road department is encouraged to participate in the program *also* because its state or county will be protected from having that data used against it no matter in whose governmental hands plaintiffs also can find those documents. Such an incentive to participate in the program is especially compelling where, as the *Guillen* majority notes, such "distinctions" as in what governmental "hands" the documents are found "are already being rendered meaningless by the electronic revolution underway." 31 P.3d at 646.

The interpretation proposed by the *Guillen* concurrence *does not* protect and *encourage* the municipal collection and keeping of accident raw data as Congress intended but instead *punishes* and *discourages* states and municipalities from participating in the hazard elimination program. Again, as the United States has noted, absent the privilege "State and private parties will likely be deterred from compiling complete and accurate information" and the vital supply of such information "will be jeopardized." The Supremacy Clause does not allow a state court to so misinterpret and undermine the purpose of Section 409 simply because it disagrees with how Congress chose to promote that goal. As a state court noted:

> Section 409 is one of the laws of the United States by which all judges of this state and the courts they serve are bound, notwithstanding anything in the constitution

and laws of this state, having to do with rule-making power, inherent authority, . . . or anything else.

See Sawyer, 606 So.2d at 1073-4. *See also City of Atlanta v. Watson*, 267 Ga. 185, 475 S.E.2d 896, 903-4 (1996)(courts "[u]niformally . . . have held that section 409 is applicable in state court" because "[t]o hold otherwise defeats a significant purpose of the federal act and cannot be justified in light of the Supremacy Clause."); *Seaton*, 898 S.W.2d at 237 ("If the forgoing is deemed to be unjust the remedy lies with Congress" citing Art. VI, § 2). In short, neither plaintiffs nor the *Guillen* concurrence can avoid reversal by arguing Section 409 does not really mean what it says.

2. *Section 409 Also Protects Against Forced Disclosure Of Information Contained Within Protected Documents And Discovery Of Those Documents From Third Parties*

The result sanctioned by both the *Guillen* majority and concurrence enables plaintiffs in the tort action not only to obtain privileged *documents* and use them to argue "the County had *notice*" of this data but "failed to make improvements," but also to compel answers to interrogatories that can *only* be derived by the County from those privileged accident reports (*i.e.* accident dates, persons involved in accidents, identities of any Sheriff's Deputies who investigated accidents at the intersection and of other County employees who "know" about any accident even if "gained indirectly such as reading reports or other documents.") *See* Cert. Pet.'s Reply Br. App "K" at 3-5 (interog. #s 3-6); 12/07/98 Pet. For Disc. Rev. at 21; 9/16/99 Pet. For Disc. Rev. at 18; 2/4/00 App's Sup. Br. at 17. The result in *Guillen* also enables plaintiffs to enforce their subpoena to the Washington State Patrol and obtain most of these same protected documents. *See* 10/7/98 Mot. For Prot. Order; 10/23/98 VT at 4; Cert.App. "D;" 12/07/98 Pet. For Disc. Rev. at 22; 9/16/99 Pet. For Disc. Rev. at 14-15; 2/4/00 App's Sup. Br. at 13-14.

However, Section 409 and state and federal case law interpreting it preclude such transparent attempts to circumvent its protection.

a. Section 409 Protects Data Within Documents

Section 409 expressly bars discovery and admissibility of not only the listed documents but also "data." The common definition of "data" is: "*things known* or assumed; *facts* or figures *from which* conclusions can be drawn." *Webster's New World Dictionary* 374 (1966) (emphasis added). Hence Section 409 also bars disclosure of *facts within* the collected documents *from which* road departments draw their conclusions. Further, allowing discovery and use in trial of information contained within the otherwise "privileged" documents hardly fulfills the statute's purpose of encouraging states to collect such data but instead again *punishes* the County for participating in the federal program. Hence, a state Supreme Court in *Sawyer v. Ill. Cent.Gulf R.R. Co.*, 606 So.2d at 1073, holds a similar argument that Section 409 "exclude[s] the actual documents, but allow[s] witnesses to testify to their contents . . . is specious." Similarly, a federal circuit court in *Harrison v. Burlington Northern R.R. Co.*, 965 F.2d at 160, holds that "allowing the witnesses to testify as to the content of [material protected by Section 409] would have circumvented the purposes of [Section 409]." Yet again, in *Shots v. CSX Transp.*, 887 F.Supp. 204, 206 (S.D. Ind. 1995), still another federal court finds that where the documents in question are protected by Section 409, any "witness' testimony about the contents of the file is also protected by the statutory privilege."

Section 409 simply requires plaintiffs to prove their claim against the County "arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data" without using those "reports, surveys, schedules, lists *or data*" against the County that it collects and compiles for the purpose of participating in the cooperative safety

program. *Rodenbeck*, 982 F.Supp. at 623. Section 409 does "not preclude testimony, expert or otherwise" so long as it "come[s] from sources apart from" the protected documents. *Id* at 625 (protecting § 409 documents *and testimony based thereon*). *See also Hester v. CSX Transportation, Inc.*, 61 F.3d 382, 387 (5th Cir. 1995) (expert could testify regarding his "personal inventory of the traffic volume" where he did not rely on information collected by the state).

b. Section 409 Protects Documents When Also Held By Third Parties

As to plaintiffs' similar attempt to circumvent the statute by obtaining the same protected documents from the *unaffiliated State* Patrol, Section 409 still remains a bar. As noted above, in Washington even accident reports retained by the State Patrol contain information generated solely for cooperative traffic safety purposes pursuant to the federal highway safety act. *See* WAC § 136-28 *et seq*. *See generally also* Merits Amicus Br. Of Alaska, *et al*. Further, as also previously noted, Section 409 has a "rather expansive scope," *Shots*, 887 F.Supp. at 205, and provides that so long as the "data [is] compiled or collected for the purpose" specified in the statute, it "*shall not* be *subject to discovery or admitted into evidence* . . . in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data." 23 U.S.C. § 409 (emphasis added). Hence, in *Rodenbeck v. Norfolk and Western Ry*, 982 F.Supp. at 621-22, plaintiffs obtained documents protected by Section 409 from "a third party during discovery" and defendants sought both to exclude those documents and prohibit any further discovery based on them. Though plaintiff argued Section "409 must be construed restrictively" and in "so doing, she indicates that the documents were supplied to her counsel in response to a discovery request directed to" other governmental entities, *id*. at 622, the court found the documents were protected by

Section 409. *Id*. at 625. Similarly, in *Taylor v. St. Louis S.W. Ry. Co.*, 746 F.Supp. 50, 53-54 (D. Kan. 1990), the court held Section 409 protects documents held by non-parties regardless of from whom they were "obtained." *But See Irion v. State*, 760 So.2d 1120, 1226 (La.App. 2000) (compelling documents not collected for Section 409 purposes that were "acquired . . . *from a third party*, not DOTD.")

The only effect of enforcing Section 409 here is that "[w]ithout hearing the prohibited evidence, the jury will have to decide whether the crossing, as it existed at the time of the accident, was abnormally dangerous . . . ." *St. Louis S.W. Ry. Co. v. Malone Freight Lines*, 39 F.3d 864, 867 (8th Cir. 1994). Indeed, as plaintiffs conceded to the state court, a trial in their action against Pierce County "will occur regardless of the posture of discovery orders at issue here." *See* 12/28/98 Response To Mot. For Disc. Rev. at 1. However, the effect of *refusing* to enforce Section 409 strikes at the heart of a successful *cooperative* program between the state and federal governments—a program that has saved tens of thousands of lives, hundreds of thousands of injuries and untold millions of dollars in economic losses. Indeed, *Guillen* calls into question the applicability in state court of *any* federal evidentiary rule.[6] Finally, and most troublesome, *Guillen* conflicts with this court's constitutional jurisprudence and upsets the "delicate balance" between state and national power intended by the founders and necessary for our national government to function.

---

[6] *See e.g.* 15 U.S.C. §6606(c)(3) (federally required statements "not admissible in evidence, under . . . rule of evidence in any State, in any proceeding to prove liability for, or the invalidity of, a claim or its amount, or otherwise as evidence of conduct or statements made in compromise negotiations."); 42 U.S.C. §1306 (prohibiting disclosure of SSA and DHHS records), and those federal statutory privileges listed at Cert. Amicus Br. Of La. at 15 n. 5 and C. Mueller & L. Kirkpatrick, 2 *Federal Evidence*, §173 at 240-251 (2d Ed. 1994).

CONCLUSION

Congress has determined that Section 409 will "enhance the safety of the nation's highways and, in the long run reduce the number of people killed and injured in accidents that could be avoided by systematic analysis, and that this goal outweighs the barriers that it creates for litigants attempting to prove that a state's negligence contributed to their injuries." *Coniker*, 695 N.Y.S. 2d at 495. In so doing, Congress foists nothing on states but—as a *concession to state interests*—offers them an *incentive* to willingly participate in a voluntary program that enhances the safety of their traveling public while also protecting their collection and compilation of necessary records and data. Nevertheless, in alleged pursuit of "state's rights," the Washington Supreme Court nullifies a *state's* discovery and evidentiary protection, jeopardizes the safety of that state's citizens and undermines bedrock principles of federalism. Indeed, the state court not only rejects its responsibilities under the Supremacy Clause and thereby upsets the balance between federal and state power intended by the framers, but disregards even the authorized policy decisions of its *own state's* legislative and executive branches.

One of Justice Holmes' and history's[7] criticisms of *Lochner v. New York*, 198 U.S. 45 (1905) is that its test for constitutional legislation depended on whether a majority of the Court agreed with the law, when in fact a judge's "agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." *Id* at 75 (Homes, J., dissenting). If the Washington State Supreme Court is not reversed and its approach to the relationship between state and national governments is allowed to stand, the foundation for a new "Lochner Era" will have been laid—

[7] *See generally* Bernard Schwartz, *A History Of the Supreme Court* at 190-198 (1993) ("Aside from *Dred Scott* itself, *Lochner v. New York* is now considered the most discredited decision in Supreme Court history.")

this time allowing *every state court* to sit as a super-legislature substituting its judgment for that of *all the states' representatives* in the national Congress. Further, *Guillen* will have done so by establishing an ill defined principle that provides no real guidance for constitutional analysis, imposes no real limit on uncontrolled state court activism and tarnishes "states rights" by using it as mere "cover" for defeating federal laws with which a court disagrees.[8] If so, *Guillen* will have accomplished what the founders strove so hard to avoid in replacing the ineffective and short lived Articles of Confederation with our present more than two hundred year old Constitution. In short, in *Guillen*:

> [T]he world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.

The Federalist No. 44, at 281 (C. Rossiter ed. 1961) (J. Madison).

Instead, "the Supremacy Clause gives the Federal Government 'a decided advantage in the delicate balance' the Constitution strikes between state and federal power," *New York v. United States*, 505 U.S. at 159 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991))—especially where as here the exercise of that power creates a *cooperative and voluntary* venture between federal and *state* government, supported by the *states*, beneficial to the *states* and protective of the citizens of the *states*. Because *Guillen v. Pierce County* is in fundamental conflict with both the Supremacy Clause

[8] *See generally* Forrest McDonald, *States Rights and The Union: Imperium in Imperio* (2000) (chronicling, among other things, how "states rights" throughout American history has been used by interest groups when out of national power and ignored by them when in power.)

and this Court's constitutional jurisprudence, petitioner respectfully requests that decision be reversed and the documents and information sought by plaintiffs from petitioner and other governmental agencies be held privileged.

Respectfully submitted,

GERALD A. HORNE
Prosecuting Attorney
DANIEL R. HAMILTON *
SUSAN P. JENSEN
Deputy Prosecuting Attorneys
955 Tacoma Avenue South
Suite 301
Tacoma, WA 98402
(253) 798-7746

* Counsel of Record

Attorneys for Petitioner

APPENDIX

RCW 4.28.080

Service made in the modes provided in this section shall be taken and held to be personal service. The summons shall be served by delivering a copy thereof, as follows:

(1) If the action be against any county in this state, to the county auditor or, during normal office hours, to the deputy auditor, or in the case of a charter county, summons may be served upon the agent, if any, designated by the legislative authority.

(2) If against any town or incorporated city in the state, to the mayor, city manager, or, during normal office hours, to the mayor's or city manager's designated agent or the city clerk thereof.

(3) If against a school or fire district, to the superintendent or commissioner thereof or by leaving the same in his or her office with an assistant superintendent, deputy commissioner, or business manager during normal business hours.

(4) If against a railroad corporation, to any station, freight, ticket or other agent thereof within this state.

(5) If against a corporation owning or operating sleeping cars, or hotel cars, to any person having charge of any of its cars or any agent found within the state.

(6) If against a domestic insurance company, to any agent authorized by such company to solicit insurance within this state.

(7) If against a foreign or alien insurance company, as provided in chapter 48.05 RCW.

(8) If against a company or corporation doing any express business, to any agent authorized by said company or corporation to receive and deliver express matters and collect pay therefor within this state.

(9) If the suit be against a company or corporation other than those designated in the preceding subdivisions of this section, to the president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent.

(10) If the suit be against a foreign corporation or nonresident joint stock company, partnership or association doing business within this state, to any agent, cashier or secretary thereof.

(11) If against a minor under the age of fourteen years, to such minor personally, and also to his or her father, mother, guardian, or if there be none within this state, then to any person having the care or control of such minor, or with whom he or she resides, or in whose service he or she is employed, if such there be.

(12) If against any person for whom a guardian has been appointed for any cause, then to such guardian.

(13) If against a foreign or alien steamship company or steamship charterer, to any agent authorized by such company or charterer to solicit cargo or passengers for transportation to or from ports in the state of Washington.

(14) If against a self-insurance program regulated by chapter 48.62 RCW, as provided in chapter 48.62 RCW.

(15) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.

(16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be

served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof, and by thereafter mailing a copy by first class mail, postage prepaid, to the person to be served at his or her usual mailing address. For the purposes of this subsection, "usual mailing address" shall not include a United States postal service post office box or the person's place of employment.

RCW 4.92.090

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

RCW 4.96.010

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

(2) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi-municipal corporation, or public hospital.

(3) For the purposes of this chapter, "volunteer" is defined according to RCW 51.12.035.

WAC 136-28-010

RCW 36.78.070(1) authorizes the county road administration board to establish standards of good practice for the administration of county roads and the efficient movement of people and goods over county roads. In order to implement the requirement of the National Highway Safety Act of 1966 that requires all states, in cooperation with their various local governments, to collect, compile and make reports to the National Highway Safety Bureau of Accident Statistics in each state, the county road administration board has acted to coordinate the activities of the county engineers and the state patrol. Each county engineer is to cooperate in this effort by following the procedure outlined below.

WAC 136-28-020

The state patrol collects accident reports from all law enforcement agencies and receives accident reports from individual drivers. Periodically, the state patrol will send or deliver to the county engineer's office in each county reports concerning accidents occurring on county roads in that county.

The county engineer will analyze each report and indicate within the appropriate spaces on the report the county number, the county road number, the milepoint and, if applicable, the road number of the intersecting county road at which the accident occurred. The county engineer shall also indicate in the appropriate space as to whether the location is rural or urban.

The coded reports will be returned to the records section of the state patrol within two weeks of receipt.

Should the county engineer determine any accident report location is not on a road contained within the latest county

road log, he/she shall return the accident report, uncoded, with a transmittal letter indicating to the best of his/her knowledge the appropriate jurisdiction such as private road, state highway, city street, other state agency, federal agency, etc.

WAC 136-28-030

(1) The county number shall be that particular number assigned to each county by the state office of financial management for county identification purposes.

(2) The county road number shall be that particular five-digit number, including both leading and trailing zeros if applicable, assigned to each county road according to the county's latest county road log. No local names or numbers or other nomenclature shall be used in coding.

(3) The milepoint shall be determined as accurately as practicable from a comparison of information on the accident report with the latest county road log.

(4) Accidents at an intersection with a state highway will be coded by the state department of transportation.

(5) To ensure uniformity, accidents at the intersection of any two county roads shall be coded to a road in the following priority order:

(a) The road with the higher functional class;

(b) The road that is the through route;

(c) The road with the lower road number.

(6) Accidents on roads and/or at intersections with dual city-county or county-county responsibilities shall be coded in general accordance with the procedures outlined herein based on a mutual understanding between the several jurisdictions involved.

Washington Constitution, Article 11, Section 1

The several counties of the Territory of Washington existing at the time of the adoption of this Constitution are hereby recognized as legal subdivisions of this state.

Washington Constitution, Article 11, Section 4

The legislature shall establish a system of county government, which shall be uniform throughout the state except as hereinafter provided, and by general laws shall provide for township organization, under which any county may organize whenever a majority of the qualified electors of such county voting at a general election shall so determine; and whenever a county shall adopt township organization, the assessment and collection of the revenue shall be made, and the business of such county and the local affairs of the several townships therein, shall be managed and transacted in the manner prescribed by such general law.

Any county may frame a "Home Rule" charter for its own government subject to the Constitution and laws of this state, and for such purpose the legislative authority of such county may cause an election to be had, at which election there shall be chosen by the qualified voters of said county not less than fifteen (15) nor more than twenty-five (25) freeholders thereof, as determined by the legislative authority, who shall have been residents of said county for a period of at least five (5) years preceding their election and who are themselves qualified electors, whose duty it shall be to convene within thirty (30) days after their election and prepare and propose a charter for such county. Such proposed charter shall be submitted to the qualified electors of said county, and if a majority of such qualified electors voting thereon ratify the same, it shall become the charter of said county and shall become the organic law thereof, and supersede any existing charter, including amendments thereto, or any existing form of county government, and all special laws inconsistent with

such charter. Said proposed charter shall be published in two (2) legal newspapers published in said county, at least once a week for four (4) consecutive weeks prior to the day of submitting the same to the electors for their approval as above provided. All elections in this section authorized shall only be had upon notice, which notice shall specify the object of calling such election and shall be given for at least ten (10) days before the day of election in all election districts of said county. Said elections may be general or special elections and except as herein provided, shall be governed by the law regulating and controlling general or special elections in said county. Such charter may be amended by proposals therefor submitted by the legislative authority of said county to the electors thereof at any general election after notice of such submission published as above specified, and ratified by a majority of the qualified electors voting thereon. In submitting any such charter or amendment thereto, any alternate article or proposition may be presented for the choice of the voters and may be voted on separately without prejudice to others.

Any home rule charter proposed as herein provided, may provide for such county officers as may be deemed necessary to carry out and perform all county functions as provided by charter or by general law, and for their compensation, but shall not affect the election of the prosecuting attorney, the county superintendent of schools, the judges of the superior court, and the justices of the peace, or the jurisdiction of the courts.

Notwithstanding the foregoing provision for the calling of an election by the legislative authority of such county for the election of freeholders to frame a county charter, registered voters equal in number to ten (10) per centum of the voters of any such county voting at the last preceding general election, may at any time propose by petition the calling of an election of freeholders. The petition shall be filed with the county

auditor of the county at least three (3) months before any general election and the proposal that a board of freeholders be elected for the purpose of framing a county charter shall be submitted to the vote of the people at said general election, and at the same election a board of freeholders of not less than fifteen (15) or more than twenty-five (25), as fixed in the petition calling for the election, shall be chosen to draft the new charter. The procedure for the nomination of qualified electors as candidates for said board of freeholders shall be prescribed by the legislative authority of the county, and the procedure for the framing of the charter and the submission of the charter as framed shall be the same as in the case of a board of freeholders chosen at an election initiated by the legislative authority of the county.

In calling for any election of freeholders as provided in this section, the legislative authority of the county shall apportion the number of freeholders to be elected in accordance with either the legislative districts or the county commissioner districts, if any, within said county, the number of said freeholders to be elected from each of said districts to be in proportion to the population of said districts as nearly as may be.

Should the charter proposed receive the affirmative vote of the majority of the electors voting thereon, the legislative authority of the county shall immediately call such special election as may be provided for therein, if any, and the county government shall be established in accordance with the terms of said charter not more than six (6) months after the election at which the charter was adopted.

The terms of all elective officers, except the prosecuting attorney, the county superintendent of schools, the judges of the superior court, and the justices of the peace, who are in office at the time of the adoption of a Home Rule Charter shall terminate as provided in the charter. All appointive

officers in office at the time the charter goes into effect, whose positions are not abolished thereby, shall continue until their successors shall have qualified.

After the adoption of such charter, such county shall continue to have all the rights, powers, privileges and benefits then possessed or thereafter conferred by general law. All the powers, authority and duties granted to and imposed on county officers by general law, except the prosecuting attorney, the county superintendent of schools, the judges of the superior court and the justices of the peace, shall be vested in the legislative authority of the county unless expressly vested in specific officers by the charter. The legislative authority may by resolution delegate any of its executive or administrative powers, authority or duties not expressly vested in specific officers by the charter, to any county officer or officers or county employee or employees.

The provisions of sections 5, 6, 7, and the first sentence of section 8 of this Article as amended shall not apply to counties in which the government has been established by charter adopted under the provisions hereof. The authority conferred on the board of county commissioners by Section 15 of Article II as amended, shall be exercised by the legislative authority of the county.

Washington Constitution, Article 11, Section 5

The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys and other county, township or precinct and district officers, as public convenience may require, and shall prescribe their duties, and fix their terms of office: Provided, That the legislature may, by general laws, classify the counties by population and provide for the election in certain classes of counties certain officers who shall exercise the powers and perform the duties of two or more officers. It

shall regulate the compensation of all such officers, in proportion to their duties, and for that purpose may classify the counties by population: Provided, That it may delegate to the legislative authority of the counties the right to prescribe the salaries of its own members and the salaries of other county officers. And it shall provide for the strict accountability of such officers for all fees which may be collected by them and for all public moneys which may be paid to them, or officially come into their possession.

Supreme Court U.S.
FILED
JUL 5 2002
CLERK

No. 01-1229

In the Supreme Court of the United States

PIERCE COUNTY, PETITIONER

v.

IGNACIO GUILLEN, LEGAL GUARDIAN OF JENNIFER GUILLEN AND ALMA GUILLEN, MINORS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES

KIRK K. VAN TINE
General Counsel
PAUL M. GEIER
Assistant General Counsel for Litigation
DALE C. ANDREWS
Deputy Assistant General Counsel for Litigation
LAURA C. FENTONMILLER
Trial Attorney
Department of Transportation
EDWARD V.A. KUSSY
Deputy Chief Counsel
MICHAEL W. HARKINS
Attorney Advisor
Federal Highway Administration
Department of Transportation
Washington, D.C. 20590

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
PAUL R.Q. WOLFSON
Assistants to the Solicitor General
MARK B. STERN
ALISA B. KLEIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Under 23 U.S.C. 152, a State that wishes to obtain federal funding for a highway safety improvement project must identify hazardous locations, assign priorities for the corrections of such hazards, and establish and implement a schedule for their improvement. Section 409 of Title 23 restricts the availability in discovery and use in litigation of reports and data "compiled or collected" by a State pursuant to Section 152 for the purpose of developing a highway safety improvement project that may receive federal funds.

In this brief the United States addresses the following questions:

1. Whether the decision of the Supreme Court of Washington was a final judgment of that court that this Court has jurisdiction to review by certiorari under 28 U.S.C. 1257(a).

2. Whether respondent may pursue a challenge that the privilege of Section 409 exceeds Congress's powers under Article I of the Constitution, given that the State of Washington and petitioner do not object to that provision.

3. Whether the Supreme Court of Washington erred in concluding that the privilege under Section 409 covers reports and data that were "collected" by a local governmental entity for purposes other than highway safety under Section 152 and that remain in the custody of the official or department that originally obtained the information for non-Section 152 purposes.

4. Whether, properly construed, the privilege afforded by Section 409 for reports and data "collected" for Section 152 purposes is a valid exercise of Congress's powers under Article I of the Constitution.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory and constitutional provisions involved	2
Statement	2
Summary of argument	14
Argument:	
I. The Court has jurisdiction to resolve this controversy	17
A. At least as to Guillen's PDA action, the Washington Supreme Court's judgment is final	17
B. Guillen may challenge 23 U.S.C. 409 as exceeding Congress's Article I powers	22
II. Section 409 does not bar discovery of materials from a state or local governmental agency that neither compiled nor collected the materials for a purpose related to Section 152, even if the same materials held by another agency would be privileged	28
A. The text, background, and purposes of Section 409 lend no support to the Washington Supreme Court's broad construction of the "collected" prong	28
B. Information stored only in a computer-based storage system accessible to several agencies may be privileged under Section 409, even when it is retrieved by an agency that performs no Section 152 functions	36
III. Section 409 does not exceed Congress's powers under Article I of the Constitution	40
Conclusion	47

TABLE OF AUTHORITIES

Cases: Page

Alabama Dep't of Transp., Ex parte, 757 So. 2d 371 (Ala. 1999) 35
Andrus v. *Allard*, 444 U.S. 51 (1979) 23
ASARCO Inc. v. *Kadish*, 490 U.S. 605 (1989) 23
Baldrige v. *Shapiro*, 455 U.S. 345 (1982) 35
Branzburg v. *Hayes*, 408 U.S. 665 (1972) 35
City of Revere v. *Massachusetts Gen. Hosp.*, 463 U.S. 239 (1983) 23
Claspill v. *Missouri Pac. R.R.*, 793 S.W.2d 139 (Mo.), cert. denied, 498 U.S. 984 (1990) 43
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 14, 19, 20, 21
CSX Transp., Inc. v. *Easterwood*, 507 U.S. 658 (1993) 25, 41
Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) 36
FBI v. *Abramson*, 456 U.S. 615 (1982) 32
Felder v. *Casey*, 487 U.S. 131 (1988) 41
FERC v. *Mississippi*, 456 U.S. 742 (1982) 25
Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) 42
Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 24-25
Harrison v. *Burlington N. R.R.*, 965 F.2d 155 (7th Cir. 1992) 44
Havens Realty Corp. v. *Coleman*, 455 U.S. 363 (1982) 22, 23
Helvering v. *Davis*, 301 U.S. 619 (1937) 26
Herbert v. *Lando*, 441 U.S. 153 (1979) 35
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) 25
Irion v. *Louisiana Dep't of Transp. & Dev.*, 760 So. 2d 1220 (La. Ct. App.), writ denied, 773 So. 2d 727 (La. 2000) 35

Cases—Continued: Page

Jefferson v. *City of Tarrant*, 522 U.S. 75 (1997) 21
Local 174, Teamsters v. *Lucas Flour Co.*, 369 U.S. 95 (1962) 41
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 27
Martinolich v. *Southern Pac. Transp. Co.*, 532 So. 2d 435 (La. Ct. App. 1988), writ denied, 535 So. 2d 745 (La.), cert. denied, 490 U.S. 1109 (1989) 43
Merrell Dow Pharm. Inc. v. *Thompson*, 478 U.S. 804 (1986) 18
Metropolitan Life Ins. Co. v. *Taylor*, 481 U.S. 58 (1987) 41
Minnick v. *California Dep't of Corrections*, 452 U.S. 105 (1981) 20
New York v. *United States*, 505 U.S. 144 (1992) 24
Oklahoma v. *United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) 26
Overlake Fund v. *City of Bellevue*, 855 P.2d 706 (Wash. Ct. App. 1993) 19
Pennsylvania v. *Ritchie*, 480 U.S. 39 (1987) 20, 21
Perez v. *United States*, 402 U.S. 146 (1971) 25
Raygor v. *Regents of the Univ. of Minn.*, 122 S. Ct. 999 (2002) 36
Reichert v. *Louisiana*, 694 So. 2d 193 (La. 1997) 3
Rodenbeck v. *Norfolk & W. Ry.*, 982 F. Supp. 620 (N.D. Ind. 1997) 44
Robertson v. *Union Pac. R.R.*, 954 F.2d 1433 (8th Cir. 1992) 5, 44
Sawyer v. *Illinois Cent. Gulf R.R.*, 606 So. 2d 1069 (Miss. 1992) 43
Shots v. *CSX Transp., Inc.*, 887 F. Supp. 204 (S.D. Ind. 1995) 44
South Carolina v. *Baker*, 485 U.S. 505 (1988) 25
South Dakota v. *Dole*, 483 U.S. 203 (1987) 26, 41, 43-44, 45

Cases—Continued: Page

Southern Pac. Transp. Co. v. *Yarnell*, 890 P.2d 611 (Ariz.), cert. denied, 516 U.S. 937 (1995) 5
St. Regis Paper Co. v. *United States*, 368 U.S. 208 (1962) 30, 35, 36
Steward Mach. Co. v. *Davis*, 301 U.S. 548 (1937) .. 27, 45, 46
Tacoma News, Inc. v. *Tacoma-Pierce County Health Dep't*, 778 P.2d 1066 (Wash. Ct. App. 1989), review denied, 785 P.2d 825 (Wash. 1990) 19
Tardy v. *Norfolk S. Corp.*, 659 N.E.2d 817 (Ohio Ct. App.), appeal not allowed, 655 N.E.2d 187 (Ohio 1995) 5
Tennessee Elec. Power Co. v. *TVA*, 306 U.S. 118 (1939) 24
Trammel v. *United States*, 445 U.S. 40 (1980) 35
United States v. *Lopez*, 514 U.S. 549 (1995) 25, 42
United States v. *Nixon*, 418 U.S. 709 (1974) 35
United States v. *Ryan*, 402 U.S. 530 (1971) 20
United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1995) 36
United States Dep't of Labor v. *Triplett*, 494 U.S. 715 (1990) 23
University of Pa. v. *EEOC*, 493 U.S. 182 (1990) 23
Wiedeman v. *Dixie Elec. Membership Corp.*, 627 So. 2d 170 (La. 1993), cert. denied, 511 U.S. 1127 (1994) 5

Constitution, statutes and regulations:

U.S. Const.:
Art. I ..... *passim*
Art. I, § 8, Cl. 1 (Spending Clause) 11, 26, 41, 42
Art. I, § 8, Cl. 3 (Commerce Clause) 11, 12, 16, 25, 40, 41, 42
Art. I, § 8, Cl. 18 (Necessary and Proper Clause) 11, 12, 16, 42
Art. III 14, 22, 23
Amend. X 14, 23, 24, 25
Amend. XXI 41

Statutes and regulations—Continued: Page

Census Act, 13 U.S.C. 9(a) (1958) 30
Freedom of Information Act, 5 U.S.C. 552(b)(7) 32
Highway Safety Act of 1973, 23U.S.C. 101 *et seq.*:
23 U.S.C. 130 3
23 U.S.C. 144 3
23 U.S.C. 152 ..... *passim*
23 U.S.C. 152(a)(1) 3
23 U.S.C. 402 ..... 37, 38, 45
23 U.S.C. 402(a) 37
23 U.S.C. 402(c) 37
23 U.S.C. 409 ..... *passim*
23 U.S.C. 409 (1988) 4
23 U.S.C. 409 (1994) 5, 23
23 U.S.C. 411 ..... 37, 38, 45
23 U.S.C. 411(a)(1)(A) 37
23 U.S.C. 411(a)(1)(C) 37
23 U.S.C. 411(a)(2) 38
Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1035(a), 105 Stat. 1978 ... 5
Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 132(a), 101 Stat. 170 4
Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 2009, 112 Stat. 337 (1998) 38
Wash. Rev. Code Ann. (West):
§ 42.17.310 (2000) 6, 14, 19
§ 47.04.050 (2001) 43
28 U.S.C. 1257 19
28 U.S.C. 1257(a) 17
23 C.F.R.:
Pt. 924 3
Section 924.9(a)(1) 37
Pt. 1335:
Section 1335.2 38
Section 1335.10(b)(1) 38

Miscellaneous:	Page
Extension of the Nation's Highway, Highway Safety, and Public Transit Programs: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation, 99th Cong., 1st Sess. (1985)	4
H.R. Conf. Rep. No. 345, 104th Cong., 1st Sess. (1995)	5, 33
H.R. Rep. No. 246, 104th Cong., 1st Sess. (1995)	5, 33
H.R. Rep. No. 665, 99th Cong., 2d Sess. (1986)	4
H.R. Rep. No. 768, 98th Cong., 2d Sess. (1984)	4
S. Rep. No. 4, 100th Cong., 1st Sess. (1987)	4
United States Dep't of Transportation, *Model Minimum Uniform Crash Criteria* (Aug. 1998)	38
United States Dep't of Transportation, *State Crash Report Forms Catalog 1999 Update* (1999)	38
United States Dep't of Transportation, *The 1996 Annual Report on Highway Safety Improvement Program* (1996)	2, 3

In the Supreme Court of the United States

No. 01-1229

PIERCE COUNTY, PETITIONER

v.

IGNACIO GUILLEN, LEGAL GUARDIAN OF JENNIFER GUILLEN AND ALMA GUILLEN, MINORS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Supreme Court of Washington (Pet. App. A1-A132) is reported at 31 P.3d 628. The opinion of the Washington Court of Appeals (Pet. App. H1-H28) is reported at 982 P.2d 123. The orders of the Superior Court of Washington (Pet. App. C1-C4, D1-D2, E1-E2, F1-F5) are unreported.

JURISDICTION

The judgment of the Supreme Court of Washington was entered on September 13, 2001. A petition for rehearing was denied on November 27, 2001 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on February 22, 2002, and was granted on April 29, 2002. On June 3, 2002, this Court granted the motion of the United States to intervene, pursuant to 28 U.S.C. 2403(a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(a).[1]

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 409 of Title 23, United States Code, provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Pertinent constitutional provisions are reproduced in the appendix to the certiorari petition (Pet. App. J1-J2).

STATEMENT

1. "Fatalities and injuries sustained in traffic accidents continue to be a major health problem in the United States. Traffic accidents are the leading cause of death of people from 6 to 28 years of age and result in more permanent disabling injuries than any other type of accident." United States Dep't of Transportation, *The 1996 Annual Report on Highway Safety Improvement Programs* S-1 (1996) (*1996 DOT Report*) (lodged with the Clerk).

[1] Respondents contested this Court's jurisdiction. See Br. in Opp. 5-10. For a discussion of the jurisdictional question, see pp. 17-22, *infra*.

In Title 23 of the United States Code, Congress has established several programs that promote national transportation safety by providing funding to the States to reduce the number and severity of traffic accidents. For example, the Secretary of Transportation may award grants to the States to improve railroad-highway safety crossings, see 23 U.S.C. 130, to replace and rehabilitate highway bridges, see 23 U.S.C. 144, and, as pertinent here, to ameliorate hazardous road conditions, see 23 U.S.C. 152. These provisions are part of a "comprehensive federal plan to promote highway safety." *Reichert* v. *Louisiana*, 694 So. 2d 193, 198 (La. 1997).[2]

Under the Hazard Elimination Program established by 23 U.S.C. 152, if a State wishes to obtain funds from the federal government for road hazard improvement projects, the State must "conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations," must "assign priorities for the correction of such locations," and must "establish and implement a schedule of projects for their improvement." 23 U.S.C. 152(a)(1). States and local governments are thus required to engage in extensive analysis and evaluation of road conditions within their respective jurisdictions if they wish to apply for federal funds for transportation safety improvement projects. See also 23 C.F.R. Pt. 924.

Congress became concerned that States and local governments might not be fully thorough and candid in assembling

[2] The Department of Transportation's most recent report to Congress about the Hazard Elimination Program established by 23 U.S.C. 152 reported that the program "has accomplished reduction in fatal, nonfatal-injury, and combined fatal-plus-nonfatal- injury accident rates of 51, 27, and 27 percent, respectively. * * * Evaluations of improvements made under the Hazard Elimination Program indicate that the program has helped to prevent more than 26,500 fatalities and 760,000 nonfatal injuries since 1974." *1996 DOT Report* S-3 (emphasis omitted).

and evaluating such safety-related information if that information could later be used against them in litigation.[3] To address that problem, in 1987 Congress enacted Section 409 of Title 23, which (as originally enacted) restricted the introduction into evidence in federal and state court of reports and data "compiled" by a state or local government for the purpose of federally funded transportation-safety improvement. See Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 132(a), 101 Stat. 170.[4]

Congress subsequently enacted two amendments to Section 409 to remedy perceived deficiencies in that law. First, in 1991, Congress provided that reports and data compiled

[3] See S. Rep. No. 4, 100th Cong., 1st Sess. 27-28 (1987); see also H.R. Rep. No. 665, 99th Cong., 2d Sess. 56 (1986) (proposed privilege was intended "to encourage greater accuracy and completeness in the compilation of such lists [of hazards], by preventing these lists from being used in any judicial proceeding, thereby improving their quality as a basis for programming"); H.R. Rep. No. 768, 98th Cong., 2d Sess. 17 (1984) (similar); *Extension of the Nation's Highway, Highway Safety, and Public Transit Programs: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 99th Cong., 1st Sess. 889 (1985) (testimony of Richard E. Briggs, Association of American Railroads).

[4] As initially enacted, Section 409 provided:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. 409 (1988).

for Section 152 purposes should be privileged from discovery, as well as inadmissible in evidence, in federal and state court litigation. See Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1035(a), 105 Stat. 1978; 23 U.S.C. 409 (1994).

Second, in 1995, Congress responded to a series of lower court decisions that had registered conflicting views on whether Section 409 barred disclosure of reports and raw data that a state or local governmental entity had collected from elsewhere for the purpose of preparing an application for Section 152 funds, or only documents that the governmental entity had itself generated for such purposes. That disagreement in the lower courts turned on the meaning of the word "compiled" in the original version of Section 409.[5] Congress determined that the privilege of Section 409 should reach "raw data collected prior to being made part of any formal or bound report" that a State submitted as part of an application for funds under Section 152, as well as any document that the State itself generated. See H.R. Rep. No. 246, 104th Cong., 1st Sess. 59 (1995); H.R. Conf. Rep. No. 345, 104th Cong., 1st Sess. 90 (1995). Accordingly, Congress amended Section 409 to provide as follows:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data *compiled or collected* for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the

[5] Compare *Southern Pac. Transp. Co.* v. *Yarnell*, 890 P.2d 611, 612 (Ariz.) (adopting narrower construction), cert. denied, 516 U.S. 937 (1995); *Wiedeman* v. *Dixie Elec. Membership Corp.*, 627 So. 2d 170, 173 (La. 1993) (same), cert. denied, 511 U.S. 1127 (1994); and *Tardy* v. *Norfolk S. Corp.*, 659 N.E.2d 817, 820 (Ohio Ct. App.) (same), appeal not allowed, 655 N.E.2d 187 (Ohio 1995) (Table), with *Robertson* v. *Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992) (adopting broader construction).

> purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. 409 (emphasis added).

2. In May 1995, based on accident reports and data in its possession, petitioner Pierce County identified an intersection within the County as especially hazardous. Pursuant to 23 U.S.C. 152, the County applied to the Washington Department of Transportation for federal funds to eliminate the hazard at that intersection. The County's initial application for federal funds was denied. In 1996, the County again applied for federal funds, and its application was granted. See Pet. App. A6.

In July 1996, three weeks before the County's application for federal funds was granted, Clementina Guillen-Alejandre was killed and her passengers were injured in an automobile collision at the same intersection. See Pet. App. A6. Relying on the State of Washington's Public Disclosure Act (PDA), Wash. Rev. Code Ann. § 42.17.310 (West 2000), respondent Ignacio Guillen, Clementina's surviving spouse, submitted a request to the County for materials and data relating to the intersection's accident history. Guillen stated, through counsel, that he was "not seeking any reports that were specifically written for developing any safety construction improvement project at the intersection at issue," but was seeking "all documents that record the accident history of the intersection that may have been used in the preparation of any such reports." Pet. App. A7. The County declined to release the requested information, claiming it was privileged under Section 409. See *id.* at A8-A9.

3. a. Guillen brought suit against the County in Washington Superior Court under the state PDA, challenging the County's denial of access to the requested materials. The Superior Court rejected the County's claim of privilege under Section 409, and ordered the County to disclose (as pertinent here) four sets of materials: (1) a list of accidents at the intersection originally prepared by the Washington State Patrol, showing the location, date, time, and nature of the accident, which the County subsequently obtained for the purpose of conducting a study of the safety of the intersection; (2) and (3) two collision diagrams prepared by a county employee responsible for investigating accidents at the intersection; and (4) reports of accidents at the intersection prepared by law enforcement agencies investigating the accidents.[6] See Pet. App. A9-A12, C3-C4, H2-H3 (identifying and describing documents). The court also awarded attorney's fees to Guillen under the state PDA. *Id.* at C3. The County appealed the Superior Court's disposition of the PDA action to the Washington Court of Appeals.

b. While that appeal was pending, Guillen filed a tort action against the County in Superior Court, alleging that the County's failure to install proper traffic controls at the intersection was a proximate cause of Clementina's death. See Pet. App. A12. Through discovery in the tort action, Guillen sought information bearing on the accident history of the intersection. The County moved for a protective order, claiming a privilege under Section 409, and Guillen moved to

---

[6] The trial court also ordered the County to disclose a draft letter from the Director of the County's Public Works Department to a County Council member, which contained information used to prepare the County's application for federal funds for hazard elimination at the intersection. Pet. App. C3, H3. The Washington Court of Appeals subsequently reversed that part of the trial court's decision. *Id.* at H25. Respondents did not further pursue that document, and we do not discuss it further in this brief.

compel. The Superior Court rejected the County's privilege claim, and ordered the County to disclose various materials and data requested by Guillen.[7] See *id.* at A13-A14, F1-F5. The County sought discretionary appellate review of the Superior Court's discovery order. The Court of Appeals granted review, and consolidated the appeal in the tort case with the County's pending appeal in the PDA action. *Id.* at G5-G6.

4. The Washington Court of Appeals affirmed in pertinent part in each case. Pet. App. H1-H28. The court concluded that, to apply the "collected" prong of Section 409 properly, a court must distinguish between materials held by an agency such as a county law enforcement agency that collects information for reasons unrelated to Section 152, and materials held by an agency such as a county public works department that collects information for Section 152 purposes. The court stated that "Section 409 does not protect reports or data collected by the former, because the former was not acting pursuant to Section 152" when it collected the information. *Id.* at H18. To apply Section 409 to materials collected for purposes unrelated to Section 152, the court remarked, "would extend Section 409 far beyond its purpose," which was "to neutralize the litigation-aiding effect, if

[7] Those materials and data include (1) the identity of county employees with knowledge of automobile accidents that took place at the intersection between 1990 and July 1996; (2) the identity of persons who had been involved in accidents at the intersection during that period; (3) the identity of Pierce County deputy sheriffs who patrolled the intersection during that period; (4) the date, identity of persons involved, and identity of all fatalities at the intersection during that period; (5) a copy of all photographs that the County had of accidents at the intersection during that period; (6) a copy of all written statements by witnesses to accidents at the intersection during that period; and (7) a copy of all accident reports sent to the County by individuals who had been involved in accidents at the intersection during that period. Pet. App. A13-A14, F2-F4.

any, of Section 152 activity." *Id.* at H21. The court thus rejected the County's argument for a broad interpretation of Section 409, stating that the County's proposed construction would give the County "carte blanche to render immune from discovery every accident report related to a public road within its territory, simply by having its road department 'collect' the report." *Id.* at H22.

The court then determined that the disclosure orders under review were consistent with its interpretation of Section 409. See Pet. App. H22-H27. The court ruled, for example, that Guillen was entitled to the accident reports requested in the PDA action because, it stated, Guillen had "carefully requested reports in the hands of the sheriff or other law enforcement agencies, *not* reports or data 'collected or compiled' by the [county] Public Works Department 'pursuant to' Section 152." *Id.* at H22-H23.[8] The court also ordered the disclosure of the collision diagrams sought in the PDA action, even though those diagrams were actually used in preparing the County's Section 152 application, because (the court stated) the County had not met its burden of showing that the diagrams were prepared in the course of Section 152 activities. See *id.* at H23-H24. The court further affirmed the trial court's order enforcing discovery in the tort suit, on the ground that the information covered by Guillen's requests was not related to the County's request for Section 152 funds. *Id.* at H25-H26. Finally, the court affirmed the trial court's award of attorney's fees to Guillen

[8] In fact, the PDA requests sent by Guillen to the County and the complaint instituting the PDA action do not indicate that the PDA request was limited to the county sheriff's office. See J.A. 7, 29, 32-33. Nevertheless, the record in this case does leave open the possibility that the county sheriff's office, or some other law enforcement agency, might retain copies of the accident reports that that law enforcement agency had generated for routine law enforcement purposes but had then transmitted to the County's Public Works Department. See J.A. 53, 56-57.

in the PDA action, noting that Guillen "is entitled to all but one of his requests." *Id.* at H27.[9]

5. a. The Supreme Court of Washington vacated the decision of the Court of Appeals, and remanded the cases for further proceedings. See Pet. App. A1-A114.

The court first rejected the construction of the "collected" prong of Section 409 offered by the court of appeals. See Pet. App. A64-A70. The court thought it "unsound in principle and unworkable in practice" to distinguish between an agency (such as the Pierce County Sheriff's Department) that collected materials for reasons unrelated to Section 152, and an agency (such as the Pierce County Public Works Department) that subsequently collected the same materials for Section 152 purposes. *Id.* at A65. The court observed that "it cannot be assumed that all state and local governments maintain multiple sets of materials such as accident reports, each held by a separate agency for a different use." *Id.* at A66 (emphasis omitted). Although the court recognized that larger jurisdictions might maintain multiple sets of records, it suggested that smaller jurisdictions might rely on a single set of documents. See *id.* at A67. And the court suggested that, as "governments everywhere move from paper and microfiche documentation into the age of twenty-first century information technology," they will increasingly rely on a single set of digital records. *Id.* at A67-A68.

The court thus construed the "collected" prong of Section 409 broadly, to bar disclosure of reports and data in the hands of any local governmental agency that collected those materials even for reasons unrelated to federal funding under Section 152, as long as another entity within the local governmental unit also collected or compiled the same

[9] The Washington Court of Appeals noted that it had assumed that Section 409 is constitutional, as neither party had raised any constitutional objection to the statute. Pet. App. H28 n.26.

materials for a purpose related to Section 152. The court remarked that all of the information that Guillen had sought from the County appeared to be covered by Section 409 as so construed, regardless of the particular agency within the County that actually held the requested data or the purpose for which it was originally obtained. See Pet. App. A64, A66.

b. Having interpreted the "collected" prong of Section 409 broadly, the court then ruled that Section 409's application to all materials "collected" by any department of a State or local governmental entity that applies for Section 152 funds serves no legitimate federal purpose and exceeds Congress's Article I powers. Pet. App. A70-A114.[10] The court stated that "no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic accident materials and 'raw data' that were originally prepared for routine state and local purposes, simply because they are 'collected,' for, *among other reasons*, pursuant to a federal statute for federal purposes." *Id.* at A92-A93. Rather, the court held, "only publicly held materials and data that were originally *created* for the identification, evaluation, planning, or development of federally funded safety enhancement projects" are lawfully privileged under Section 409. *Id.* at A113-A114.

The court rejected the Spending Clause, the Commerce Clause, and the Necessary and Proper Clause as possible constitutional bases for Section 409 (as it had construed that statute). As for the Spending Clause (U.S. Const. Art. I, § 8, Cl. 1), the court acknowledged that Congress may seek "to influence state behavior by conditioning the receipt of

[10] Relying on federal decisions, the court ruled that Guillen had "standing" to challenge the constitutionality of Section 409 as exceeding Congress's power, even though state officials opposed that challenge and supported the validity of the law. Pet. App. A75-A78.

federal funds upon behavioral changes." Pet. App. A85. But, the court stated, the "strings" that condition the receipt of federal funds must be "firmly attached to a legitimate federal interest in a specific federal project or program." *Id.* at A92 (internal quotation marks omitted). The court concluded that Section 409 does not satisfy that constitutional "nexus" requirement because (under the court's broad construction of Section 409) even materials originally prepared for routine state and local purposes would be covered by the privilege. *Id.* at A92-A93.

As for the Commerce Clause (U.S. Const. Art. I, § 8, Cl. 3), the court acknowledged that "a sufficient nexus exists between interstate commerce and the Federal-aid highway system to justify the regulatory scheme when considered as a whole." Pet. App. A103-A104 (internal quotation marks omitted). Nevertheless, it held that Section 409 itself (as it had construed that statute) is not an "integral part of the regulatory program" advancing national transportation safety. *Id.* at A104. The court remarked that the "vital federal purposes" behind Section 409 are not "reasonably served by also barring the discovery and admissibility in state court of routinely prepared state and local traffic and accident materials and data that would exist even had a federal safety enhancement program never been created." *Id.* at A105.

Finally, the court rejected the Necessary and Proper Clause (U.S. Const. Art. I, § 8, Cl. 18) as a grounding for Section 409. The court accepted that Congress has authority "to require state courts to enforce a federal privilege protecting materials that would not have been created but-for" federal programs such as Section 152. Pet. App. A107. The court concluded, however, that it was neither necessary nor proper to extend that privilege to materials "created and collected for state and local purposes, simply because they

are *also* collected and used for federal purposes." *Id.* at A107-A108.

The Washington Supreme Court thus curtailed the constitutionally permissible reach of Section 409 to materials and data that are originally created ("compiled") for the specific purpose of applying for Section 152 funding. Pet. App. A116-A117. The court further stated that the record "contains insufficient facts to apply this standard to all of the disputed items," and it therefore vacated the Washington Court of Appeals' decision and ordered a remand "for supplementation of the record and further proceedings not inconsistent" with its opinion. *Id.* at A114. The court affirmed the award of attorney's fees to Guillen in the PDA suit, however, "since the record suggests that he was entitled to at least four of the five items to which he was denied access in his PDA case." *Id.* at A113.

c. Justice Madsen, joined by two other members of the court, concurred in the result. See Pet. App. A115-A132. Justice Madsen rejected the majority's view that, under Section 409, "original police reports prepared for purposes unrelated to § 152, become privileged, even in the hands of the party that created them, once they have been 'collected' by any entity for purposes of § 152." *Id.* at A118-A119. He argued, rather, that the Section 409 privilege protects only the entity that collected the materials for a Section 152 purpose. See *id.* at A125-A127. Justice Madsen also remarked that, "[b]y preventing a litigant from gaining access to information that has been 'collected' for purposes of securing federal funding, Congress has made the litigant no better off than they would have been had the State not participated in the funding program." *Id.* at A127. He further observed that the canon of avoiding constructions that place statutes in constitutional doubt counseled against

the majority's broad construction of Section 409. See *id.* at A130-A131.[11]

SUMMARY OF ARGUMENT

I. A. This Court has jurisdiction to resolve the parties' controversy over the scope and validity of 23 U.S.C. 409. The Washington Supreme Court's decision is final at least as to Guillen's action seeking documents under the Washington Public Disclosure Act, for it directed the award of attorney's fees to Guillen, indicating that Guillen was entitled to a judgment ordering the disclosure of those documents. As to Guillen's tort claim, although the state supreme court's decision lies at an interlocutory stage of the case, it falls within the third exception outlined in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 481 (1975).

B. Guillen may challenge the constitutionality of Section 409 as exceeding Congress's Article I powers. Guillen has Article III standing based on the alleged adverse effect of Section 409 on his state-created right to obtain information from the County. The County argues that, because neither it nor the State of Washington objects to Section 409, Guillen may not claim that Section 409 violates the Tenth Amendment's constitutional protection of state sovereignty. But the Washington Supreme Court did not rule that Section 409 interferes with state sovereignty, as that concept is usually understood. Nor did the lower court rule that the State or the County had been impermissibly "coerced" into accepting Section 409 as a condition of federal funds. Rather, the court ruled that Section 409's "collected" prong (as it construed that provision) serves no legitimate federal interest and therefore lies outside the bounds of Congress's Article I

[11] Like the majority, the concurring justices would have remanded the case because the record did not permit them to determine whether the disputed documents would be privileged under the correct interpretation of Section 409. See Pet. App. A132.

powers. This Court has adjudicated many claims by private persons affected by federal laws that those laws lie outside the reach of Congress's enumerated powers, including Congress's spending powers. The application of Section 409 in Guillen's case directly affects him, and therefore he may challenge that law.

II. A. Section 409 does not provide a privilege for records held by a local government agency that compiled or collected those records for routine local purposes entirely unrelated to federal highway safety programs such as 23 U.S.C. 152, even if that agency subsequently provided copies of those records to another agency for the transferee agency's Section 152-related purposes. That reading of the "collected" prong of Section 409, which is narrower than the construction placed on it by the Washington Supreme Court, finds support in the text, background and purposes of Section 409. The language of Section 409 does not suggest that, merely because materials have been "collected" by one agency for a Section 152-related purpose, all other persons from whom that agency obtained that information are retroactively covered by the privilege, even if the transferors collected the information only for routine local purposes.

Congress, moreover, enacted Section 409 to ensure that States and local governments would be candid and thorough in their evaluations of road hazards, by protecting them against the risk that information assembled to evaluate those hazards would then be used against them in litigation. There is no evidence to suggest that Congress intended to place potential tort plaintiffs in a worse position than they would have occupied if Section 152 had never been enacted, by extending the privilege to records in files routinely maintained by an agency that had never collected or used those records for a Section 152-related purpose. Rather, Congress retained an express statutory link between the

privileged information and the federal purpose for collecting and compiling the data.

B. A different situation arises if the information is stored only on a networked computer-based system that is accessible to state and local government agencies for Section 152-related purposes, among others. The United States Department of Transportation makes funds available to the States for the establishment and maintenance of computer-based storage of accident report information, in part to facilitate the evaluation of accident information necessary for applications for funds under Section 152. If a State stores its accident information only on such a computer system, the information would exist in only one place, and would have been "collected" in that place for Section 152-related purposes. The digitally stored information would therefore be covered by the privilege of Section 409. A remand may be necessary in this case to determine whether the information sought by Guillen is privileged under the proper construction of Section 409.

III. Properly construed, Section 409 is plainly a legitimate exercise of Congress's Article I powers. Section 409 falls within the reach of the Commerce Clause because it substantially furthers the national interest in transportation safety. The hazard elimination program of Section 152 removes unsafe obstacles to interstate commerce, and Section 409 ensures that that hazard elimination program is optimally effective. Similarly, Section 409 is a legitimate exercise of the Necessary and Proper Clause power because it serves to protect the efficacy of Congress's other, undisputably legitimate federal programs (including Section 152) that expend funds to promote transportation safety. Finally, Section 409 is a legitimate exercise of Congress's spending power because the privilege is designed to encourage States to detect and address hazardous highway conditions, and, properly construed, it applies only to materials and

information that were compiled or collected for that purpose. Given the firm support that the State of Washington and Pierce County show for Section 409, there is no basis for concluding that either was impermissibly coerced into accepting that privilege.

ARGUMENT

I. THE COURT HAS JURISDICTION TO RESOLVE THIS CONTROVERSY

The parties have raised two possible objections to the Court's authority to resolve this controversy. First, Guillen has argued that the Washington Supreme Court's decision was not a final judgment that this Court has authority to review under 28 U.S.C. 1257(a). See Br. in Opp. 5-10. Second, the County has maintained that Guillen lacks "standing" to challenge the constitutionality of Section 409. See Pet. 27-29. In our view, both arguments ultimately fall wide of the mark, but we address them in this brief because both arguments are not insubstantial, both may have implications for other cases, and either, if accepted, could prevent the Court from resolving the merits of an important constitutional dispute.

A. At Least As To Guillen's PDA Action, The Washington Supreme Court's Judgment Is Final

1. The judgment of the Supreme Court of Washington under review constituted that court's decision in two different actions that had been consolidated in the Washington Court of Appeals—the PDA suit in which the Superior Court had ordered partial summary judgment for Guillen, and the County's appeal of the Superior Court's interlocutory discovery order in the tort action. See Pet. App. G5-G6. The argument for finality is stronger in the PDA action. Both the Superior Court and the Court of Appeals ruled that Guillen was entitled to disclosure of four documents in the PDA suit and thus ruled that summary judgment was proper

as to those documents. See pp. 7-8, *supra*. The PDA case was therefore not in an interlocutory posture as it was presented to the Supreme Court of Washington.[12]

The Supreme Court of Washington remanded the consolidated cases because it found the record insufficient to apply the truncated version of Section 409 to "all of the disputed items." Pet. App. A114. Nonetheless, it also approved the award of attorney's fees to Guillen in the PDA action, and expressly noted that "the record suggests that [Guillen] was entitled to at least four of the five items to which he was denied access." *Id.* at A113. It is unlikely that the Washington Supreme Court would have awarded attorney's fees to

[12] The privilege conferred by Section 409 bars the protected materials from being "subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages." 23 U.S.C. 409. None of the state courts suggested that Section 409 might be applicable only to Guillen's tort action, and not also to his PDA suit. Nor did Guillen make such an argument in his brief in opposition to the County's certiorari petition. The question whether Section 409 applies at all in a PDA suit is therefore not before this Court.

As a general matter, Section 409 may not bar disclosure under state PDA-type statutes, because a suit to enforce a PDA law neither constitutes "discovery" nor in itself constitutes being "considered" for other purposes in an action for damages. In this case, however, the Supreme Court of Washington ruled that (a) the State's PDA was not intended to be used as a tool for pretrial discovery (or to avoid otherwise applicable limits on discovery) and (b) Guillen had no greater rights to disclosure under the state PDA in this case than under state pretrial discovery rules because litigation between Guillen and the County was reasonably anticipated when Guillen made his PDA request to the County. Thus, the Washington Supreme Court essentially concluded that the application of the PDA in this case would effectively amount to discovery in Guillen's action for damages against the County, and Guillen's PDA request was therefore subject to the limitation in Section 409. See Pet. A28-A30; see also *Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804, 816 & n.14 (1986).

Guillen unless it believed that the PDA case had been conclusively resolved in his favor.[13]

2. The tort action presents a more difficult jurisdictional question. The Washington Supreme Court's decision in the tort action is not final in the literal sense. That decision addressed only a discovery order, and the lawsuit continues between the parties in the trial court. This Court, however, has not construed the finality requirement of Section 1257 in a "mechanical fashion," but has taken jurisdiction even under circumstances in which "there are further proceedings in the lower state courts to come." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975).

There are two potential obstacles to a conclusion that the decision under review in the tort action is final. First, the Washington Supreme Court did not affirm the Court of Appeals' ruling ordering the County to respond to Guillen's discovery requests, but rather remanded the case for application of Section 409—as truncated by that court to documents that were "compiled" (*i.e.*, originally created) for Section 409 purposes—and for supplementation of the record.[14] It may be, however, that the County has no basis for arguing on remand that any of the contested information that

[13] Under the Washington PDA law, "[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record" shall be awarded attorney's fees. Wash. Rev. Code Ann. § 42.17.340 (West 2000). The Washington courts have generally construed the term "person who prevails" to require that the requester "ha[ve] an affirmative judgment rendered in its favor at the conclusion of the entire case." See *Overlake Fund* v. *City of Bellevue*, 855 P.2d 706, 710 (Wash. Ct. App. 1993); *Tacoma News, Inc.* v. *Tacoma-Pierce County Health Dep't*, 778 P.2d 1066 (Wash. Ct. App. 1989), review denied, 785 P.2d 825 (Wash. 1990) (Table).

[14] The County has argued that the remand applies only to the now-dismissed *Whitmer* action. See Pet. 6 n.1. The Washington Supreme Court's decision, however, does not distinguish between the two cases in its remand order.

remains at issue was originally generated by the County for Section 152-related purposes. If that is so, then "the ultimate judgment [of the state courts] on the federal issue [of discoverability] is for all practical purposes preordained." *Minnick* v. *California Dep't of Corrections*, 452 U.S. 105, 120 (1981).

Second, even if the federal issue is definitively settled, there remains the point that a discovery order ruling against a claim of privilege is ordinarily not considered final, at least where the party resisting discovery has not refused to comply with the order. Cf. *United States* v. *Ryan*, 402 U.S. 530 (1971).[15] The question then arises whether this case falls within any of the "exceptions" to the finality rule articulated in *Cox*, *supra*. As we understand the record, the one exception that might apply here is the third exception, under which this Court may hear a case if "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481; see *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 47-48 (1987).

If the information is disclosed to Guillen, and if the County eventually prevails in the state courts on Guillen's claim of negligence, then the County could not present its federal claim of privilege for this Court's review, and Washington courts would be bound by the Washington Supreme Court's decision in this case construing and invalidating Section 409. At the same time, it is not clear that if Guillen prevails at

[15] The fact that the County has not refused to comply with the discovery order is of less significance in this case than is usually true. If, on remand, the County refused to comply and was held in contempt, the County could appeal the contempt order (assuming state law provided for such an appeal) to the Washington Supreme Court, renewing its federal claim of privilege. There would be little point in requiring the County to make a second trip through the state court system where, as here, the highest court of the State has already definitively rejected all of its federal arguments. See *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 48 n.7 (1987).

trial (and on any state-court appeal from the verdict), the County will necessarily be able to seek this Court's review of its federal claim of privilege. For example, Guillen might not be able to use the information obtained in discovery at trial.[16] In either event, the County would have suffered the harm that Section 409 is designed to prevent—disclosure of privileged information—but would not be able to show that the disclosure had affected the ultimate judgment in Guillen's favor. Cf. *Ritchie*, 480 U.S. at 49; *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 83 (1997).

To the extent the matter is in doubt, the fact that this case involves a federal statute held unconstitutional should tip the balance in favor of review. Cf. *Cox*, 420 U.S. at 483 (observing that, under the fourth exception, the Court will review a case "if a refusal immediately to review the state-court decision might seriously erode federal policy.").[17] That is especially so since the Washington Supreme Court's ruling, quite apart from its impact on the tort suit, could chill state and local agencies more broadly in their preparation of materials for safety enhancement purposes. Cf. *id.* at 486.

3. There remains the possibility that, even if the decision below is not final in the tort action, this Court could review the lower court's decision in the PDA action. The Wash-

[16] See Pet. App. A35-A37 (Washington Supreme Court holding that, although certain kinds of accident reports are "confidential" under state law and are therefore inadmissible at trial, they are not privileged from disclosure in pretrial discovery).

[17] We do not maintain that the fourth *Cox* exception itself applies here. In particular, this does not seem to be a case "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Cox*, 420 U.S. at 482-483. The County has not argued, to our knowledge, that Guillen's tort action would have to be dismissed if Guillen were denied the information sought in the interrogatories.

ington Court of Appeals ordered the cases consolidated and "argued as one case." Pet. App. G6. Nonetheless, it does not appear that the state courts intended to treat the PDA action and the tort action as one case for finality purposes, in the sense that the state courts could not enter a final judgment in one until the other was completed. Presumably, for example, if the cases were remanded to the Superior Court, the cases could resume their separate identities, and the PDA case could be closed even while litigation continued in the tort action. Thus, it appears that the Court may exercise jurisdiction and render a decision on the scope and validity of Section 409 at least in the PDA action. Even if the Court lacks jurisdiction as to the tort action and must dismiss the petition in part, the parties would be free to move in the state courts for reconsideration of any orders in the tort action in light of this Court's controlling decision.

B. Guillen May Challenge 23 U.S.C. 409 As Exceeding Congress's Article I Powers

1. The County maintains that Guillen does not have "standing" to challenge the constitutionality of Section 409 on federalism grounds, given that that statute is supported by both the State of Washington and the County. See Pet. 27-29. Guillen plainly has standing in the Article III sense, however. Guillen alleges an adequate injury in fact from the application of the Section 409 privilege in his actions against the County. Absent the application of Section 409, Guillen would have a right under state law to the information that he seeks. The possibility that Section 409, which preempts conflicting state law, would deprive him of his state-law right to obtain that information is sufficient to endow him with Article III standing. Cf. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373-374 (1982) (injury to a right to obtain information created by statute is sufficient to support Article III

standing).[18] In any event, this Court's subject matter jurisdiction to entertain this case under Article III is satisfied by the fact that the state supreme court's decision below has a concrete and adverse effect on petitioner, the County, by requiring the County to disclose allegedly privileged information. Cf. *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 617-619 (1989).

2. The more difficult question is whether Guillen lacks "third-party standing" to assert what the County argues can only be the constitutional rights of States and local governments under the Tenth Amendment. This Court has emphasized that the question whether an individual litigant in state court such as Guillen can assert the federal rights of a third party (here, the State or the County) is little different from "whether a person in the litigant's position would have a [federal] right of action on the claim." *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 721 n.** (1990) (internal quotation marks omitted); see *City of Revere* v. *Massachusetts Gen. Hosp.*, 463 U.S. 239, 243 n.5 (1983) (observing that, in cases from state courts raising third-party standing issues, "standing and the merits are inextricably intertwined") (internal quotation marks omitted).

---

[18] Although the right to obtain information at issue here was created by state, not federal, law, that distinction is not significant for Article III purposes. The injury to Guillen's state-created right to obtain information is sufficiently "distinct and palpable" (*Havens Realty*, 455 U.S. at 372) to support Article III standing. In an analogous context, this Court has frequently noted that virtually all property interests are creations of state law, and yet it has also recognized that the alleged deprivation of a state-created property interest is sufficient to establish an individual's standing to challenge the constitutionality of a federal law that allegedly impairs that property interest. See *Andrus* v. *Allard*, 444 U.S. 51, 64 n.21 (1979); see also *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 618-619 (1989) (ruling that petitioner had Article III standing based on deprivation of a state-created right by state supreme court's allegedly erroneous construction of federal law).

The County's argument that Guillen lacks standing under the Tenth Amendment rests principally on *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118, 144 (1939). In that case, state-chartered electric utilities challenged the constitutionality of the sale of electricity by the Tennessee Valley Authority (TVA), arguing they would be harmed by competition from electricity sold by TVA. This Court held that the utilities lacked standing because they had no protected "legal right" in avoiding competition from other sellers of electricity, private or governmental. See *id.* at 137-138, 139-140, 143-144. The Court also added, in response to the utilities' argument that the sale of electricity by the TVA violated the Tenth Amendment:

> The sale of government property in competition with others is not a violation of the Tenth Amendment. As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the [utilities], absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] amendment.

Id. at 144 (footnote omitted).

Tennessee Electric does not preclude Guillen's standing here. This case does not directly present a question whether Section 409 violates the Tenth Amendment, in the sense of invading a sphere of sovereignty reserved to the States or impermissibly interfering with the governmental structure of the States.[19] Although the Washington Supreme Court

[19] This Court has used the terminology of the "Tenth Amendment" to refer to a variety of constitutional concepts grounded in federalism, but most often it has used that term to refer to "the province of state sovereignty reserved" by the Constitution, as opposed to the limitations on federal power inherent in the fact that the federal government was delegated only limited and enumerated powers. See *New York* v. *United States*, 505 U.S. 144, 155, 160 (1992); see also *Gregory* v. *Ashcroft*, 501 U.S. 452, 463 (1991); *South Carolina* v. *Baker*, 485 U.S. 505, 513 (1988); *FERC* v. *Mississippi*, 456 U.S. 742, 753-771 (1982); *id.* at 775-779 (O'Connor, J., concurring in the judgment in part and dissenting in part); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289-293 (1981).

referred in passing in its decision to the Tenth Amendment (see Pet. App. A78-A79) and to Section 409's effect on state sovereignty (*id.* at A108-A110), its decision focused on whether the "collected" prong of Section 409 exceeds the permissible reach of Congress's Article I powers because it is not related to any legitimate federal interest (*id.* at A84-A108). The Washington Supreme Court did *not* express any doubt that Congress has authority to prescribe rules of privilege applicable in state-court litigation (as well as in federal courts), provided that the subject matter of the privilege lies within a power constitutionally delegated to Congress—just as the federal government has authority within its delegated powers to preempt state-law causes of action entirely, cf. *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658 (1993). Indeed, the Washington Supreme Court acknowledged that Section 409's privilege for materials "created" for Section 152 purposes is constitutional and enforceable in state courts. See Pet. App. A107.

Once it is understood that Guillen's challenge to Section 409 involves alleged limitations on Congress's delegated powers rather than an alleged incursion on state sovereignty, it becomes clear that the Court may adjudicate Guillen's constitutional claim, even if neither the State nor the County joins in his challenge. This Court has adjudicated numerous cases in which federal statutes were challenged as lying beyond the reach of Congress's Commerce Clause power, even when the State where the regulated activity took place raised no objection to the statute. See, *e.g.*, *United States* v. *Lopez*, 514 U.S. 549 (1995); *Perez* v. *United States*, 402 U.S. 146 (1971). The Court also upheld,

on the merits, the federal social security tax against a challenge that the purposes to which the proceeds of the tax were to be applied lay beyond Congress's power to spend for the general welfare. In that case, the challenge was raised by a derivative shareholder of an employer subject to the tax, not the State. See *Helvering* v. *Davis*, 301 U.S. 619, 640-645 (1937).

The Court has in other cases considered (and rejected) contentions *by a State* that restrictions imposed on States (or their officials) as a condition or consequence of the State's acceptance of federal funds violated constitutional principles of federalism, including limitations on Congress's spending power. See *South Dakota* v. *Dole*, 483 U.S. 203 (1987) (upholding Act of Congress directing that percentage of federal highway funds be withheld from any State that permits sale of alcohol to anyone under 21 years of age); *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) (upholding Act of Congress restricting political activities of state officials whose employment was financed by federal funds). The County suggests that, if the State manifests its acceptance of the federal funds along with the federal conditions and decides not to challenge those conditions, a private individual in the State adversely affected by the conditions cannot raise any challenge based in the Spending Clause to the federally imposed conditions.

The County's argument might have merit in a case where the federal statute had required the State to change its laws as a condition of accepting federal funds, and the State had done so. For example, if, in response to the statute challenged in *South Dakota* v. *Dole*, a State had "succumb[ed] to the blandishments offered by Congress and raise[d] its drinking age to 21," 483 U.S. at 211, it is difficult to see how a private individual under the age of 21 who wished to purchase alcohol could have established standing to challenge the *federal* statute. The state law would stand as an

independent barrier to that individual's ability to purchase alcohol. The individual could not show that his injury would be redressable by a federal court order invalidating the federal law. Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 569-571 (1992) (opinion of Scalia, J.).[20]

Section 409 is not structured in that fashion, however. It does not require the state government to take any affirmative act to adapt any provision of *state* law governing the discovery or admissibility into evidence of specified materials as a condition to participating in a federal funding program. Rather, Section 409 embodies a rule of *federal* law that directly precludes certain materials from being disclosed in the course of discovery or admitted into evidence at trial. Although it establishes a binding rule of decision to be applied in state (and federal) courts, it is in that sense no different from any federal law preempting a state-law rule of decision. Section 409 operates directly on individual litigants, by depriving them of their state-created right to obtain certain information. Those adversely affected individual litigants may raise a constitutional challenge to Section 409.[21]

---

[20] Thus, in *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), the Court expressed doubt that an Alabama employer could challenge the constitutionality of the federal unemployment compensation tax on the ground that the federal statute had impermissibly coerced the States into establishing their own unemployment compensation funds. In that case, the State of Alabama had established its own compensation fund, and by operation of the federal statute, the employer received a credit against its federal tax liability to reflect part of the amount that it was obligated to pay the State. At least as to the amount of its obligation to the State, the Court remarked, the employer could not claim to be "coerced through the operation of [the federal] statute," for it "pa[id] in fulfillment of the mandate of the local legislature." *Id.* at 589.

[21] Moreover, under any plausible theory, it is clear that a litigant who may be adversely affected by Section 409, such as Guillen, could argue that Section 409 does not apply to his discovery requests and could invoke the principle of constitutional avoidance in support of that argument. It

II. SECTION 409 DOES NOT BAR DISCOVERY OF MATERIALS FROM A STATE OR LOCAL GOVERNMENTAL AGENCY THAT NEITHER COMPILED NOR COLLECTED THE MATERIALS FOR A PURPOSE RELATED TO SECTION 152, EVEN IF THE SAME MATERIALS HELD BY ANOTHER AGENCY WOULD BE PRIVILEGED

A. The Text, Background, And Purposes Of Section 409 Lend No Support To The Washington Supreme Court's Broad Construction Of The "Collected" Prong

1. The Washington Supreme Court construed the "collected" prong of Section 409 to bar the discovery of materials held by a governmental agency that neither compiled nor collected the materials for reasons related to Section 152, as long as another agency or office within the State or local governmental entity subsequently collected the same material for its own, Section 152-related purposes. The Washington Supreme Court believed that no coherent distinction could be drawn between the original versions of traffic accident reports held by a local law enforcement agency that generated those documents for routine, law enforcement purposes unrelated to Section 152, and copies of the same accident reports subsequently transmitted to a county agency that used those materials for Section 152-related purposes (which copies would plainly be privileged). See Pet. App. A67-A68. The court further ruled, however, that this broad application of the Section 409 privilege served no legitimate federal purpose and therefore could not be sustained under Congress's Article I powers. Accordingly, the court ruled that the Section 409 privilege may validly protect

---

would an odd result if that litigant could not also challenge Section 409 directly as in excess of Congress's powers under Article I.

only materials that were *originally generated* ("compiled") for a Section 152-related purpose.

As the concurrence explained, however, the Washington Supreme Court's constitutional ruling was premised on an incorrect reading of Section 409. Section 409 precludes the discovery and introduction into evidence only of materials that were compiled or collected for a Section 152-related purpose. The privilege has no application when materials are sought from an entity that compiled or collected them for reasons unrelated to Section 152, even if another entity subsequently gathered or used the materials for a Section 152 purpose. Properly construed in that manner, Section 409 raises no constitutional concerns.

The Washington Supreme Court suggested, however, that the distinction between copies of documents "as held" by one agency and copies "as held" by another would soon lose force, as local governments move from paper documents to networked, computer-based, digital storage systems. See Pet. App. A67-A68. That concern is not without force. Indeed, it is of particular interest to the Department of Transportation, which has consistently urged States and local governments to standardize their accident reporting systems, to move towards digital storage systems, and to use networked systems to make the information on accident reports available throughout States and local governments. As we explain below, it may well be the case that, if the only information about an accident is available on such a computer-based system, and if that computer-based system was established at least in part to facilitate applications for federal funds under Section 152, information stored on that computer-based system would be privileged. See pp. 36-39, *infra*. But the privilege does not extend to originals of traditional, paper accident reports still maintained by a law enforcement agency that generated those reports for routine law enforcement purposes, even if the same reports are later

transmitted to a state or local public works agency that uses them for Section 152-related purposes.

2. The text, purposes, and background of Section 409 lend no support to the Washington Supreme Court's broad construction of the privilege.

a. The text of Section 409 is, at a minimum, readily susceptible of a narrower construction than that offered by the Washington Supreme Court. Section 409 provides a privilege for "reports * * * compiled or collected for the purpose of * * * planning the safety enhancement of * * * hazardous roadway conditions * * * pursuant to" Section 152. Under a straightforward application of that statutory language, when the Section 409 privilege is claimed for a particular document or set of materials, the court must ask whether that document or set of materials was either compiled or collected for such a purpose. If a particular document, as held by the agency that maintains it in its custody (for example, a local law enforcement agency), was neither compiled nor collected for such a purpose, it would not be privileged—even if a copy of the same document or the same information, as held by another agency (for example, a planning agency), would be privileged because the state highway department or local planning agency had collected the materials for Section 152-related purposes.[22]

---

[22] This Court has previously noted that copies of documents held by one party may not be privileged, even when the law bars disclosure of other copies of the same documents that are in the custody of another entity. In *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), the Court held that the version of Section 9(a) of the Census Act, 13 U.S.C. 9(a) (1958), in effect at the time did not provide a privilege for copies of reports that a company had submitted to the Census Bureau, even though the same provision barred the Census Bureau itself from disclosing its own copies of the same reports. See also 368 U.S. at 218-219 (noting same principle governing discoverability of trade secrets and copies of tax returns).

Thus, for example, if discovery were sought from a county or a county sheriff's office seeking all reports that the sheriff's office had received or generated about accidents at a certain location within a certain number of years, and if the sheriff's office had received or generated those reports for routine law enforcement purposes, a court should not conclude that the sheriff's office had either "compiled or collected" those reports for Section 152-related purposes. That would be true even if copies of those accident reports already had been, or were later, transmitted to the state highway department or county planning agency, which intended to use them for its own Section 152-related purposes. Although the reports in the control of the highway department or the planning agency would have been "collected" by the highway department or planning agency for Section 152-related purposes and thus would be privileged under Section 409, it does not follow that the highway department's or planning agency's use of the information in those documents for Section 152-related purposes would retroactively render privileged the version of the documents that the sheriff's office had previously generated, and had maintained, for its own law enforcement purposes.[23]

---

[23] The difference between accident reports as held by the sheriff's department and accident reports as held by a state highway department or local planning agency could be significant in many cases. A county sheriff's department, for example, might index the reports by the identity of the driver or the date of the accident, rather than location of the accident. Such a collection of reports would be of little use to a tort plaintiff who was attempting to prove that a specific location was particularly dangerous, or that authorities knew that that location was particularly dangerous. Depending on the circumstances, such a sheriff's office might also be able to argue that requiring it to retrieve its accident reports by location would be unduly burdensome under applicable discovery rules. The state highway department or local planning agency, however, might well index accident reports by location, especially if it used those reports to prepare applications for Section 152 funds. A

The Washington Supreme Court has apparently read Section 409 to provide that, if a copy of a document is ever "collected" by *anyone* for Section 152-related purposes, then all preexisting copies of that document become privileged. Presumably, under that reading, if a county planning office obtained accident reports from the state highway patrol (or a private party) for the County's Section 152-related purposes, then the originals of the accident reports maintained by the state highway patrol (or the private party) would also be privileged under Section 409, because the reports were subsequently "collected" by someone—the County—for Section 152 purposes. It is far more natural to read Section 409 as barring discovery of a document only if that particular document, or an earlier version of it, was collected or compiled for Section 152-related purposes.[24]

b. This construction of Section 409 also finds support in the background and purpose of that provision. Before 1995,

---

collection of information about locations could prove much damaging to a State or local government in subsequent tort litigation.

[24] If a county planning agency collected information for its own Section 152-related purposes and then subsequently transmitted that information to another agency that used the information for non-Section 152-related purposes, the information in the hands of the transferee agency would nonetheless be privileged under Section 409. That is so because the information or documents held by the transferee agency would not have existed but for the planning agency's collection of that information for Section 152-related purposes. Even in the hands of the transferee agency, the information would still have been "collected for the purpose of" (23 U.S.C. 409) preparing an application for funds under Section 152. In a somewhat analogous context, this Court has held that Exemption 7 of the Freedom of Information Act, 5 U.S.C. 552(b)(7), which exempts from disclosure certain "records or information compiled for law enforcement purposes," covers information that was originally compiled by a law enforcement agency for a law enforcement purpose, but was subsequently summarized and recompiled for another entity that used the information for non-law-enforcement purposes. See *FBI* v. *Abramson*, 456 U.S. 615, 624-625 (1982).

the privilege extended only to materials and data that were "compiled" for the purpose of seeking funds under Section 152. See 23 U.S.C. 409 (1994). Some state courts had interpreted the privilege narrowly, ruling that it protected a government agency's evaluations of road safety hazards but not the raw data that the agency had collected to make those evaluations. See p. 5, *supra*. Congress's extension of the privilege in 1995 to include materials that were "collected" for Section 152-related purposes was intended to overrule those decisions and ensure that "raw data collected prior to being made part of any formal or bound report" that a State or local government submitted as part of an application for funds under Section 152 would be privileged. See H.R. Rep. No. 246, *supra*, at 59; H.R. Conf. Rep. No. 345, *supra*, at 90.

Congress was concerned that States and local governments that wanted to apply for federal funds for road hazard elimination would be less than completely thorough or candid in their evaluations of hazards within their jurisdictions if the materials they assembled to make those evaluations could be used against them in tort litigation. Thus, as the committee reports make clear, Congress intended to protect the "raw data" that a governmental entity collected before *that entity* placed its evaluation of the data (or the data themselves) in any "formal or bound report." That protection removes any disincentive that the entity might have had in assembling the material necessary to prepare a thorough and candid Section 152 application. As Justice Madsen stated below, Congress wanted to ensure that Section 152 applications and their supporting documentation were not converted into "a work free 'tool' to use in civil litigation" for tort plaintiffs against state and local governments. Pet. App. A116.

There is no evidence, however, that Congress wanted to put potential tort plaintiffs in a *worse* position than they would have occupied had Section 152 never been enacted.

Yet that is essentially the effect of the Washington Supreme Court's treatment of Section 152's "collected" prong. Under that reading, even materials that tort plaintiffs would have routinely been able to obtain under state law—such as accident reports compiled and maintained by local law enforcement agencies for their own routine purposes—would become privileged merely because another agency later used copies of those reports in pursuance of a Section 152 application. That construction converts Section 409 from a shield into a sword: it goes well beyond preventing the *federal* application process under Section 152 from being used as a tool in civil litigation against local governments, and allows local governments to fend off litigation that they would have faced under *state* law if that application process had never existed.

Contrary to the Washington Supreme Court's reading, the 1995 amendment to Section 409 did not break the link between the privilege and the federal transportation safety programs. Section 409 applies only to materials compiled or collected "*for the purpose of* identifying, evaluating, or planning the safety enhancement of potential accident sites [or] hazardous roadway conditions * * * pursuant to section 152. 23 U.S.C. 409. A document in the custody of a law enforcement agency that compiled or collected the document for reasons completely unrelated to Section 152 cannot be said to have been compiled or collected "for the purpose of" making the necessary evaluations under Section 152.[25]

[25] The Washington Supreme Court thought it would be unworkable to distinguish between an agency that collects materials for reasons unrelated to Section 152 and an agency that subsequently collects the same materials for a Section 152 purpose, because some small governmental entities might maintain only a single set of records. Pet. App. A66. As we explain below, the observation that governmental entities might maintain only a single set of records has some force, especially in light of developments of computer systems for storage of accident information. See pp. 36-39, *infra*. The court's observation does not render the distinction unworkable in the general run of cases, however, where local law enforcement agencies still retain original versions of their own accident reports. Indeed, state courts have applied the distinction between documents held by agencies performing Section 152-related purposes and documents held by other agencies without apparent difficulty. See *Ex parte Ala. Dep't of Transp.*, 757 So. 2d 371, 374 (Ala. 1999) (holding that Section 409 precluded the plaintiff from obtaining information from the Alabama Department of Transportation, but noting that the information the plaintiff sought was "under the custody and control of the Alabama Department of Public Safety" and that the plaintiff thus was "not without a source for the information"); *Irion* v. *Louisiana Dep't of Transp. & Dev.*, 760 So. 2d 1220, 1226 (La. Ct. App.) (the fact that accident reports collected by the Louisiana Department of Public Safety for law enforcement purposes were subsequently used by the State's Department of Transportation in seeking federal funds did not make the underlying facts inadmissible), writ denied, 773 So. 2d 727 (La. 2000).

3. Two additional factors point away from the broad construction placed on Section 409 by the Washington Supreme Court.

First, if there is some remaining uncertainty about the proper scope of Section 409, resolution of that uncertainty may properly be informed by the principle that, because evidentiary privileges "are in derogation of the search for truth," they are to be narrowly construed. *United States* v. *Nixon*, 418 U.S. 683, 709-710 (1974); see also *University of Pa.* v. *EEOC*, 493 U.S. 182, 189 (1990); *Trammel* v. *United States*, 445 U.S. 40, 50 (1980); *Herbert* v. *Lando*, 441 U.S. 153, 175 (1979); *Branzburg* v. *Hayes*, 408 U.S. 665, 690 & n.29 (1972). That principle is applicable to privileges created by statute as well as those established at common law. *Baldrige* v. *Shapiro*, 455 U.S. 345, 360 (1982); *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 218 (1961). Thus, although Section 409 must be applied according to its terms and purposes to bar discovery and admission in to evidence of

privileged data, it should not be read expansively so as to "suppress otherwise competent evidence." *Ibid.*

Second, the Washington Supreme Court acknowledged that the constitutional infirmities it found in Section 409 arose solely because, in its view, the statute reached materials originally prepared for routine state and local purposes and held by entities with no Section 152 functions. See Pet. App. A91, A104-A105. That constitutional doubt, however, should have counseled the court against adopting a broad construction of the statute where, as here, a narrower one fully consistent with the Constitution is readily available. See *Raygor* v. *Regents of the Univ. of Minn.*, 122 S. Ct. 999, 1006 (2002); *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 77-79 (1994); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

B. Information Stored Only In A Computer-Based Storage System Accessible To Several Agencies May Be Privileged Under Section 409, Even When It Is Retrieved By An Agency That Performs No Section 152 Functions

As the Washington Supreme Court observed, recent and continuing developments in information technology may soon allow States and local governments to store accident report information only in a single set of electronic files, to which all agencies having a need for such information could gain access by a networked computer system. See Pet. App. A66-A67. These developments present a challenge in applying Section 409, for, as the court below noted, once such a networked system is put in place, it may represent the only existing collection of accident reports and data. A state or local agency would obtain accident report information only by gaining access to the system. In such a situation, there would be no distinction between the information as held by a

county law enforcement agency and the information as held by the county planning office.

In our view, the existence of a single, networked, computer-based system for storage of accident report information to be used by agencies for several purposes—including Section 152-related purposes—*would* change the analysis. It is important to understand that the basic reasons for the very existence of such computer-based data storage systems include facilitating applications for hazard improvement funds under Section 152. Such systems are often established and designed specifically with a view to facilitating the Section 152 application process, and federal funds are provided for such purposes.[26]

Section 402 of Title 23 directs the Secretary of Transportation to establish "a highway safety program for the collection and reporting of data on traffic-related deaths and injuries by the States," 23 U.S.C. 402(a), and authorizes the appropriation of funds to assist the States in implementing such programs, 23 U.S.C. 402(c). Section 411 of Title 23 further directs the Secretary to make grants to the States for programs to improve highway safety data—including, specifically, programs to "improve the timeliness, accuracy, completeness, uniformity, and accessibility of the data of the State that is needed to identify priorities for national, State, and local highway and traffic safety programs," 23 U.S.C. 411(a)(1)(A), and to "link these State data systems, *including traffic records*, with other data systems within the State, such as systems that contain medical and economic data," 23 U.S.C. 411(a)(1)(C) (emphasis added). The Secretary's regulations implementing Section 411 make clear that the pur-

---

[26] Indeed, the Department of Transportation's regulations implementing Section 152 require the States to have "[a] process for collecting and maintaining a record of accident, traffic and highway data." 23 C.F.R. 924.9(a)(1).

poses of a federal grant under that part include improvement of the "timeliness, accuracy, completeness, uniformity, and accessibility of the data needed by each State to identify highway safety priorities." 23 C.F.R. 1335.2; see also 23 C.F.R. 1335.10(b)(1).[27]

Under these funding programs, States receive grants from the Department of Transportation under Section 411 to establish computer-based systems that are intended, *inter alia*, to make it easier for States and local governments to retrieve and use the information on accidents that is needed for preparing applications for hazard improvement funds under Section 152.[28] The very existence and nature of the system ensure that data entered into the system will be available for Section 152-related purposes (as well as other purposes). As a result, all accident report information entered into such a system has been "collected" for a Section 152-related purpose (although it may also have been collected for other purposes).

---

[27] The Department has also assisted the States in identifying the information needed for such a computer-based system and the format in which such information should be prepared. See 23 U.S.C. 411(a)(2) (directing the Secretary to determine the "model data elements necessary to observe and analyze national trends in crash occurrences"). The Department has, for example, prepared a report identifying model minimum uniform crash criteria to be used for statewide motor vehicle traffic crash data systems. See United States Dep't of Transportation, *Model Minimum Uniform Crash Criteria* (Aug. 1998) (lodged with the Clerk). The Department has also prepared a catalogue of crash report forms used in each of the States, and has placed those forms on the internet. See United States Dep't of Transportation, *State Crash Report Forms Catalog 1999 Update* (lodged with the Clerk).

[28] Congress authorized $932.5 million to be spent under Section 402 for Fiscal Years 1998-2003, and $32 million to be spent under Section 411 for Fiscal Years 1999-2002. See Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 2009, 112 Stat. 337 (1998).

That is so even though (to use the example given by the Washington Supreme Court, see Pet. App. A66) a law enforcement officer who enters accident report information into the system may not be subjectively aware, at the time that he does so, that that information will be available on the system for a planning agency's Section 152-related needs. The information exists in one place, and it exists there in part for a Section 152-related purpose. That information is therefore covered by the Section 409 privilege.[29]

It is not clear whether, on the facts of this case, the County might claim the benefit of Section 409 by arguing that its accident report information resided on such a computer-based system. Evidence in the record suggests that the County Public Works Department obtained paper copies of accident reports from the state patrol, the county sheriff, and other local law enforcement agencies. See J.A. 53-54. As we have explained, any versions of those accident reports that were still maintained by the transferor agencies would not be privileged under Section 409, if the originating agencies collected and compiled them for purposes entirely unrelated to Section 152. A remand may be necessary, however, to establish whether the contested documents and information in this case are privileged under Section 409, as properly construed.[30]

---

[29] If the information on the computer system were privileged under Section 409, it would remain privileged even if a local law enforcement agency subsequently printed out a copy of that information for its own, non-Section 152-related purposes. Just as information contained in paper records that were once "collected" by a planning agency for Section 152-related purposes would remain privileged even after those records were transferred to another agency using them for other purposes (see p. 32, n.24, *supra*), so also information that has been "collected" on a networked computer-based system for Section 152-related purposes remains "collected" for that purpose even after it has been printed out.

[30] As we understand the record, the County's Public Works Department, as part of its process of preparing a Section 152 application, ob-

III. SECTION 409 DOES NOT EXCEED CONGRESS'S POWERS UNDER ARTICLE I OF THE CONSTITUTION

Properly construed, Section 409's application to materials "collected" for Section 152-related purposes is plainly a legitimate exercise of Congress's Article I powers.

First, even though Section 409 is part of a federal spending program, it can be sustained as an exercise of Congress's authority under the Commerce Clause, for it substantially advances the national interest in transportation

---

tained a list of accidents from the state patrol and may also have obtained accident reports from various law enforcement agencies including, but not limited to, the County's own sheriff's department. See Pet. App. A9-A10; J.A. 47-48, 53- 54. If the County Public Works Department obtained the list of accidents and accident reports from sources outside the County, that information would likely be privileged in the hands of the County under Section 409 because it would have been "collected" by the County for a Section 152-related purpose.

Whether the information would be privileged under Section 409 in the hands of the state patrol would depend on the purposes for which the state patrol had collected or compiled the information. If, for example, the state patrol compiled a list of accidents in response to a request from the County Public Works Department, the list would likely be privileged because the patrol would have compiled it for the purpose of assisting the County's Section 152 application. On the other hand, routine law enforcement records underlying that list, such as accident reports generated by the state patrol, would likely not be privileged under Section 409. State law, however, might not permit Guillen to obtain discovery of those law enforcement records from the state patrol, if the state patrol could show that responding to such a discovery request would be unduly burdensome. In addition, the record suggests that the County's Public Works Department may have retransmitted some of this information to other entities within the County. See J.A. 51. For the reasons explained at p. 32 n.24, *supra*, the information, if privileged in the custody of the Public Works Department, would remain privileged when held by the transferee agency.

safety.[31] Interstate commerce depends vitally on safe intersections, highway bridges, and rail-highway crossings. Hazardous conditions at such vulnerable points in the Nation's transportation system literally impede the flow of interstate commerce.

Section 409 encourages the States to evaluate those hazardous conditions and to take the steps necessary to ameliorate them (including utilizing federal funds under Section 152), which in turn permits commerce to circulate more freely. Congress reasonably concluded that, without a privilege

---

[31] This Court has never suggested that measures enacted in connection with a federal spending program may be sustained *only* as an exercise of Congress's spending power. In *South Dakota* v. *Dole*, the government defended the challenged federal statute, which required the Secretary of Transportation to withhold a percentage of federal highway funds from any State that allowed persons under 21 years old to purchase or publicly possess alcohol, under both the Commerce Clause and the Spending Clause. South Dakota maintained that the Twenty-first Amendment precluded the government from relying on the Commerce Clause. The Court found it unnecessary to resolve the Commerce Clause and Twenty-first Amendment issues, and instead sustained the statute under Congress's spending power. See 483 U.S. at 205-206.

In this case, there is no independent constitutional principle, such as the Twenty-first Amendment, that would prevent Congress from acting under the Commerce Clause to establish the privilege in Section 409. Although the Section 409 privilege applies in both state-court and federal-court litigation, that fact raises no concerns about constitutional principles of federalism. It is a commonplace that Congress may, in pursuit of legitimate federal regulatory objectives, bar state-law causes of action entirely. See *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658 (1993); *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). The Court has also made clear that Congress can displace state-court procedural rules that interfere with federal interests in a federal cause of action. See *Felder* v. *Casey*, 487 U.S. 131, 141-153 (1988); *id.* at 153-156 (White, J., concurring). Congress likewise has the authority under Article I to bar the discovery of evidence that would be relevant to a state-law cause of action in state court, if such discovery would impair federal regulatory objectives.

covering information that States and local governments compiled and collected to evaluate hazardous conditions within their jurisdictions, those entities might be so concerned about exposure to liability that they might not assemble the necessary information, or might not be optimally thorough and candid in doing so. By encouraging States and local governments to take steps that will lead to improvements in the Nation's transportation system, Section 409 serves to protect both the "channels of interstate commerce" and the "instrumentalities of interstate commerce." See *United States* v. *Lopez*, 514 U.S. 549, 558 (1995). Indeed, as a measure designed to protect and regulate transportation, Section 409 stands in a line of venerable authority dating back to *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

Second, Section 409 is a valid exercise under the Necessary and Proper Clause of Congress's power to ensure that its spending programs for highway safety remain effective. There is no dispute that Congress may legitimately act, under the Spending Clause and Commerce Clause, to provide the States with funds necessary to ameliorate highway hazards, as it has done under 23 U.S.C. 152. Congress has the constitutional authority to ensure that this funding program is not undermined by the concerns about liability discussed above. It is necessary and proper for Congress to ensure that local jurisdictions are not chilled from being candid and thorough in utilizing federal funds out of a concern that doing so might effectively subject them to liability for damages in a tort action.

Finally, the privilege conferred by Section 409 is itself a proper exercise of Congress's Article I spending power, because it is a legitimate incident of the national program to improve transportation safety by providing funds to the States for amelioration of hazardous highway conditions. If a State applies for federal funds under Section 152, it accepts, as a condition of participating in the federal program,

that the information compiled or collected for the purpose of making such an application will not be admissible in its own courts. The State of Washington is free to decline to participate in the program, but it has voluntarily chosen to do so and has expressly assented to the conditions incident to that program. See Wash. Rev. Code Ann. § 47.04.050 (West 2001).[32]

"Congress may attach conditions on the receipt of federal funds" even if those conditions would not be authorized by "the direct grants of legislative power found in the Constitution." *South Dakota* v. *Dole*, 483 U.S. at 206, 207. This Court has suggested that conditions on federal spending programs "might be illegitimate if they are unrelated to the federal interest in particular national projects or programs." *Id.* at 207 (internal quotation marks omitted). But the privilege of Section 409, designed to encourage the States to detect and address hazardous highway conditions, is closely related to the legitimate federal interest in national transportation safety reflected in the Nation's transportation-safety laws, including Section 152. See *id.* at 208 (observing that the funding conditions challenged in *South Dakota* v. *Dole* satisfied the "nexus" requirement because they were "directly related to one of the main purposes for which highway funds are expended—safe interstate travel").[33]

---

[32] See *Sawyer* v. *Illinois Cent. Gulf R.R.*, 606 So. 2d 1069, 1074 (Miss. 1992) ("[N]obody made Mississippi get into the * * * safety enhancement program. It is a voluntary program."); *Claspill* v. *Missouri Pac. R.R.*, 793 S.W.2d 139, 140-141 (Mo.), cert. denied, 498 U.S. 984 (1990); *Martinolich* v. *Southern Pac. Transp. Co.*, 532 So. 2d 435, 438 (La. Ct. App. 1988), writ denied, 535 So. 2d 745 (La.), cert. denied, 490 U.S. 1109 (1989).

[33] Other than the decision of the Washington Supreme Court in this case, federal and state courts have uniformly recognized that the privilege of Section 409 is directly related to the goal of improving highway safety, in that it is designed to encourage the candid gathering, evaluation, and communication of safety data without fear that the data or reports will be used in litigation. As the Eighth Circuit stated, "the underlying intent of

That point is unassailably true in light of the proper construction of "collected" in Section 409 that we have outlined in Part II, *supra*, for the privilege does not cover materials that are collected and maintained by local governmental agencies for their routine local law enforcement purposes alone, and not also for Section 152-related purposes. Rather, as the language of Section 409 itself makes clear, the privilege reaches only materials and information that were demonstrably collected or compiled *for a Section 152-related purpose*. The nexus to the federal spending program is therefore inherent in the statutory condition for the application of the privilege.[34]

---

the statute is to facilitate candor in administrative evaluations of highway safety hazards." *Robertson*, 954 F.2d at 1435 (internal quotation marks omitted). See also *Harrison* v. *Burlington N. R.R.*, 965 F.2d 155, 160 (7th Cir. 1992); *Rodenbeck* v. *Norfolk & W. Ry.*, 982 F. Supp. 620, 623 (N.D. Ind. 1997); *Shots* v. *CSX Transp., Inc.*, 887 F. Supp. 204, 205 (S.D. Ind. 1995); *Reichert*, 694 So. 2d at 197.

[34] Congress's Article I power to promote transportation safety covers as well the situation we have described (pp. 36-39, *supra*) where a State or local government maintains all of its accident data on one integrated computer system. As we have explained, because the accident data on such systems is maintained in only one place, it is impractical to distinguish between data held by one agency for Section 152-related purposes and data held by another agency for other purposes. Rather, it is inherently the case that, when the accident information is entered onto the system, it is "collected" for a Section 152-related purpose (among others).

Furthermore, such computer systems are themselves at least in part a product of a federal spending program authorized under Sections 402 and 411. See pp. 36-39, *supra*. Congress can permissibly extend States and local governments an incentive to accept federal funds for the establishment of such computer systems by providing that, if one of the purposes for which accident report information is entered onto such a system is to ensure its ready availability for Section 152 purposes, then that information will be privileged in damages actions against the States and local governments. If States and local governments believed that accident report information that would be privileged when held by one agency (such as a county planning agency) would become available in discovery if it were placed on a system available to all of the jurisdiction's agencies, they might well be deterred from accepting federal funds under Section 411 to develop such a computer system. Indeed, Congress could permissibly have concluded more generally that the benefits of offering States and local governments the incentive to gather and evaluate transportation safety-related information thoroughly and candidly would have warranted a broader privilege that would afford some protection to certain safety-related information even as gathered and held by agencies other than those that prepare applications for Section 152 funds, such as law enforcement agencies.

Nor can Guillen challenge Section 409 on the ground that the financial benefits offered to Washington in the highway safety funding program impermissibly "coerce" the State into accepting the condition that any information collected by the State and local governments for Section 152-related purposes will be privileged. Whatever might be said of the *State's* ability in theory to challenge Section 409 on the ground that th highway funding program is coercive, cf. *South Dakota* v. *Dole*, 483 U.S. at 211-212, a claim based on such alleged coe[illegible]ised by a private individual like Guillen has no force when the State has voluntarily agreed to participate in the program, has assented to the conditions, and has expressly opposed Guillen's challenge. This Court rejected a similar claim of coercion in *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), where an employer subject to federal unemployment compensation tax argued that the tax had coerced the States into establishing their own unemployment compensation funds, by subsidizing those state funds and providing that the covered employer would receive a credit against his federal unemployment tax liability if he paid taxes to a state fund. The Court ruled there that the State of Alabama was not coerced because "[e]ven now she [the State] does not offer a suggestion that in passing the unemployment law she was affected by duress. For all that appears she is satisfied with her choice, and would be sorely

disappointed if it were now to be annulled." 301 U.S. at 589 (citations omitted).

So too here, neither Pierce County nor the State of Washington has offered any suggestion that it was affected by duress in applying for and accepting federal hazard elimination funds under Section 152. To the contrary, Pierce County has come to this Court as petitioner to defend the constitutionality of Section 409, and the State of Washington supports the federal statute as well. In the voluntary acceptance of funds by the State and the County subject to Section 409 and other conditions—and the absence of objection by either to Section 409—it cannot be said that either entity is "coerced" in any meaningful sense into accepting the federal evidentiary privilege, which is indeed provided largely for their benefit, under Section 409.

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

KIRK K. VAN TINE
General Counsel
PAUL M. GEIER
Assistant General Counsel for Litigation
DALE C. ANDREWS
Deputy Assistant General Counsel for Litigation
LAURA C. FENTONMILLER
Trial Attorney
Department of Transportation
EDWARD V.A. KUSSY
Deputy Chief Counsel
MICHAEL W. HARKINS
Attorney Advisor
Federal Highway Administration
Department of Transportation

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
PAUL R.Q. WOLFSON
Assistants to the Solicitor General
MARK B. STERN
ALISA B. KLEIN
Attorneys

JULY 2002

(21)

Supreme Court, U.S.
FILED
AUG 19 2002
OFFICE OF THE CLERK

No. 01-1229

In The

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF FOR RESPONDENTS

SALVADOR A. MUNGIA
WSBA #14807
Counsel of Record
DARRELL L. COCHRAN
WSBA #22851
J. BRADLEY BUCKHALTER
WSBA #29295
1201 Pacific Avenue
Suite 2200
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

55pp

QUESTIONS PRESENTED

In 1966 Congress enacted the Federal Highway Safety Act, authorizing the federal government to grant funds to states in exchange for traffic accident information. In 1987 Congress amended the Act, adding Section 409 to create a privilege that, as the statute reads today, protects information "compiled or collected" by states for the purpose of obtaining federal highway funding.

- As Section 409 is a privilege in derogation of the truth, should this Court construe it narrowly or expansively?
- Does Respondent have standing to challenge the authority of Congress to enact Section 409 where he has been adversely affected by its terms?
- Did Congress exceed its authority under the Spending Clause when it amended the Highway Safety Act twenty-one years after its enactment to impose a new condition on the receipt of federal funds that is ambiguous and fails to promote the purposes of the Act?
- Are state court rules of discovery, evidence, and pre-trial procedure economic or commercial endeavors substantially affecting interstate commerce such that Congress may regulate them by Section 409 under the Commerce Clause?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
A. Federal highway funding	1
1. In 1916 Congress enacted the Federal-Aid Road Act	1
2. In 1917 Washington State, in RCW 47.04.050, accepted the conditions of the Federal-Aid Road Act of 1916. The Washington legislature last amended RCW 47.04.050 in 1961	2
3. Since 1937 Washington State has required its law enforcement agencies to produce reports as a result of automobile accidents	3
4. In 1966 Congress enacted the Federal Highway Safety Act that required, as a condition of receiving federal funds, that states compile traffic accident data	3
5. In 1984 Congress amended 23 U.S.C. § 402, providing federal grants to states to develop computerized record keeping systems. Any reports made as a result of that funding were inadmissible in evidence	5
6. All fifty states received federal highway funds from 1966 to 1987	6
7. In 1987 Congress enacted 23 U.S.C. § 409	7

TABLE OF CONTENTS – Continued

	Page
8. In 1991 Congress amended Section 409 to prevent discovery of the enumerated items	9
9. In 1995 Congress amended Section 409 to add the term "or collected."	9
B. The underlying facts of this dispute	13
C. Washington State has a strong public policy of holding state governmental entities accountable for their tortious conduct	15
SUMMARY OF ARGUMENT	16
ARGUMENT	19
A. 23 U.S.C. § 409 is an ambiguous statutory privilege that must be construed narrowly	19
B. Guillen has standing to challenge the constitutionality of Section 409	26
C. Section 409 exceeds Congress' power under the Spending Clause	30
1. Section 409 was not enacted to further the general welfare	32
2. Because the conditions imposed by Section 409 are ambiguous, the statute fails to meet the second Dole requirement	33
3. Section 409 is not a reasonable condition that is relevant to the federal interest at stake in the 1966 Highway Safety Act	38
D. Section 409 exceeds Congress' power under the Commerce Clause	38
CONCLUSION	44

TABLE OF AUTHORITIES

Page

CASES

Baldrige v. Shapiro, 455 U.S. 345 (1982) 20

Berglund v. Spokane County, 103 P.2d 355 (Wash. 1940) 15

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) 43

Diversified Investment v. DSHS, 775 P.2d 947 (Wash. 1989) 37

Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) 29

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 25

Ex Parte Alabama Dep't of Transp., 757 So.2d 371 (Ala. 1999) 23

Felder v. Casey, 487 U.S. 131 (1988) 46

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) 46

Gregory v. Ashcroft, 501 U.S. 452 (1991) 39

Guillen v. Pierce County, 982 P.2d 123 (Wash. App. 1999) 14, 23

Guillen v. Pierce County, 31 P.3d 628 (Wash. 2001) 15, 23

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 40

Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) 40

John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989) 20, 21, 22, 24

TABLE OF AUTHORITIES – Continued

Page

Katzenbach v. McClung, 379 U.S. 294 (1964) 40

N.L.R.B. v. Jones & Laughlin Steel, 301 U.S. 1 (1937) 39

Newman v. King County, 947 P.2d 712 (Wash. 1997) 20, 21

Norfolk Southern Ry. v. Shanklin, 529 U.S. 344 (2000) 43

Patterson v. New York, 432 U.S. 197 (1977) 43

Perez v. United States, 402 U.S. 146 (1971) 40

Printz v. United States, 521 U.S. 898 (1997) 44, 45

Ruff v. County of King, 887 P.2d 886 (Wash. 1995) 15

Russell v. City of Grandview, 236 P.2d 1061 (Wash. 1940) 15

South Dakota v. Dole, 483 U.S. 203 (1987) ..... *passim*

State v. Carswell, 557 So.2d 183 (Fla. 1990) 37

State v. Johnson, 173 N.W.2d 894 (S.D. 1970) 37

State v. Rodriguez, 379 So.2d 1084 (La. 1980) 37

Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118 (1939) 26, 27, 28

United States v. Lopez, 514 U.S. 549 (1995) ..... *passim*

United States v. Morrison, 529 U.S. 598 (2000) 17, 29, 41, 42, 43

United States v. Nixon, 418 U.S. 683 (1974) 20

United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001) 25

Warth v. Seldin, 422 U.S. 490 (1975) 28

Wickard v. Filburn, 317 U.S. 111 (1942) 40

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. Const., Art. I, Sec. 8 44
Washington Const., Art. 2 § 1 37
5 U.S.C. § 552(b)(7) 21
18 U.S.C.§ 922(q)(1)(A) 41
23 U.S.C. § 158 31
23 U.S.C. § 402(a) 4, 23
23 U.S.C. § 402(c) 4, 5
23 U.S.C. § 402(k)(1) 5, 6
23 U.S.C. § 409 ..... *passim*
42 U.S.C. § 13981(b) 42
Pub. L. No. 100-17, 101 Stat. 170 (1987) 7
RCW 42.17 13
RCW 47.04.050 ..... 2, 35, 36
RCW 47.04.060 2
RCW 47.04.070 ..... 2, 3
RCW 47.36.020 16
Chapter 468-95 Washington Administrative Code 16

MISCELLANEOUS

133 CONG. REC. S3,480 (1986) 9
141 CONG. REC. H9,257-9,309 (1995) 12
141 CONG. REC. S17,203 (1995) 10
141 CONG. REC. S17,206 (1995) 10

TABLE OF AUTHORITIES – Continued

Page

141 CONG. REC. S17,209-10 (1995) 11
141 CONG. REC. S17,217 (1995) 11
H. REP. No. 99-665 (1987) 8
H. REP. No. 104-246 (1995) 12
S. REP. No. 89-1410 (1966) 1
H.R. CONF. REP. No. 104-345 (1995) 9, 11
U.S. DEPARTMENT OF TRANSPORTATION, TABLE FA-4, APPORTIONMENT OF FEDERAL-AID HIGHWAY FUNDS AND ALLOCATION OF OTHER FUNDS ADMINISTERED BY THE BUREAU OF PUBLIC ROADS (1966-1967) 6
U.S. DEPARTMENT OF TRANSPORTATION, TABLE FA-4, APPORTIONMENT OF FEDERAL-AID HIGHWAY FUNDS AND ALLOCATION OF OTHER FUNDS ADMINISTERED BY THE FEDERAL HIGHWAY ADMINISTRATION (1968-1987) 6

STATEMENT OF THE CASE

A. Federal highway funding

In 1966 Congress enacted the Federal Highway Safety Act, granting federal highway funds to states in exchange for traffic accident information. By the terms of the Act, if a state failed to gather the required information, it received no federal funds.

In 1987 Congress amended the Act by enacting Section 409 to provide that certain traffic accident information could not be introduced into evidence in state or federal court proceedings. In 1991 Congress amended Section 409 to prohibit discovery of that same information. Congress again amended Section 409 in 1995, broadening the scope of the prohibition. Congress did not, during any of these times, find the amendment was needed to carry out the data-gathering requirement of the Act.

The following briefly summarizes the history of relevant federal highway funding statutes and related state statutes.

1. In 1916 Congress enacted the Federal-Aid Road Act.

On July 11, 1916, Congress passed the precursor to the present Federal Highway Safety Act, the Federal-Aid Road Act. S. REP. No. 89-1410 at 2,801 (1966). Eighteen years later, Congress passed the Hayden-Cartwright Act of 1934, marking the first time Congress granted federal funds to states for surveys, planning, and engineering investigations for future highway improvements. *Id.* at 2802. Congress next passed the Federal-Aid Highway Act of 1944, providing not only for an expanded federal-aid

primary system, but also authorizing funds for a system of secondary highways and arterial extensions in urban areas. *Id.* Congress followed with the Federal-Aid Highway Act of 1956 that, among other things, authorized $25 billion through fiscal year 1969 to complete the federal highway system.

2. In 1917 Washington State, in RCW 47.04.050, accepted the conditions of the Federal-Aid Road Act of 1916. The Washington legislature last amended RCW 47.04.050 in 1961.

In 1917 the Washington legislature enacted RCW 47.04.050, expressing Washington's assent to the federal government's 1916 Federal-Aid Road Act. The Washington legislature last amended RCW 47.04.050 in 1961. Since that time, the Washington legislature has passed no statute demonstrating its assent to new terms or conditions imposed by the federal government for subsequent versions of the federal-aid highway program.

Pierce County argues Washington assented to the terms of the 1966 Highway Safety Act by amending RCW 47.04.060 and 47.04.070 in 1961. Pet. Br. at 3. Those provisions, however, merely set forth how the state will work with the federal government to obtain highway funding. More importantly, because those provisions were last amended in 1984, they cannot be construed as assenting to the subsequent enactment of Section 409 in 1987.

3. Since 1937 Washington State has required its law enforcement agencies to produce reports as a result of automobile accidents.

By statute, Washington law enforcement officers have been required for the past 65 years to prepare accident reports when investigating a traffic accident:

> Any police officer of the state of Washington or of any county, city, town or other political subdivision, present at the scene of any accident or in possession of any facts concerning any accident whether by way of official investigation or otherwise shall make report thereof in the same manner as required of the parties to such accident and as fully as the facts in his possession concerning such accident will permit.

RCW 46.52.070(1).

4. In 1966 Congress enacted the Federal Highway Safety Act that required, as a condition of receiving federal funds, that states compile traffic accident data.

In 1966 Congress passed the Federal-Aid Highway Act. In the 1966 Act, Congress required each state to have highway safety programs designed to reduce highway accidents and deaths. It also required states to develop a system to track accident information:

> The Secretary shall establish a highway safety program for the collection and reporting of data on traffic-related deaths and injuries by the States. Under such program, the States shall collect and report such data as the Secretary may require. . . . In addition such uniform guidelines shall include, but not be limited to, provisions for

> an effective record system of accidents (including injuries and deaths resulting therefrom), accident investigations to determine the probable causes of accidents, injuries, and deaths, vehicle registration, operation, and inspection, highway design and maintenance (including lighting, markings, and surface treatment), traffic control, vehicle codes and laws, surveillance of traffic for detection and correction of high or potentially high accident locations, enforcement of light transmission standards of window glazing for passenger motor vehicles and light trucks as necessary to improve highway safety, and emergency services.

23 U.S.C. § 402(a).

Significantly, the 1966 Act provided that if a state did not comply with the terms of the 1966 Act, it would receive no federal highway funds:

> The Secretary shall not apportion any funds under this subsection to any State which is not implementing a highway safety program approved by the Secretary in accordance with this section.

23 U.S.C. § 402(c). If a state failed to develop an approved safety program, the Secretary would withhold at least one-half of that state's funds until the state complied. If the state failed to comply, the Secretary was required to reapportion the withheld funds to the other states:

> Funds apportioned under this section to any State, that does not have a highway safety program approved by the Secretary or that is not implementing an approved program, shall be reduced by amounts equal to not less than 50 per centum of the amounts that would otherwise be apportioned to the State under this section, until

> such time as the Secretary approves such program or determines that the State is implementing an approved program, as appropriate. . . . If the Secretary determines that the State did not correct its failure within such period, the Secretary shall reapportion the withheld funds to the other States in accordance with the formula specified in this subsection not later than 30 days after such determination.

23 U.S.C. § 402(c).

The 1966 Act contained no provision excluding traffic accident data either from discovery or admission into evidence in state court proceedings. Congress nowhere concluded that such a provision was a necessary part of carrying out the purposes of the Act.

5. In 1984 Congress amended 23 U.S.C. § 402, providing federal grants to states to develop computerized record keeping systems. Any reports made as a result of that funding were inadmissible in evidence.

In 1984 Congress enacted subsection (k) to 23 U.S.C. § 402. In that amendment, which is not at issue here, Congress directed the Secretary to:

> make a grant to any State which includes, as part of its highway safety program . . . the use of a comprehensive computerized safety record-keeping system designed to correlate data regarding traffic accidents, drivers, motor vehicles, and roadways. Any such grant may only be used by such State to establish and maintain a comprehensive computerized traffic safety record-keeping system or to obtain and operate components to support highway safety priority

programs identified by the Secretary under this section.

23 U.S.C. § 402(k)(1). Congress also provided:

> [I]f a report, list, schedule, or survey is prepared by or for a State or political subdivision thereof under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such a report, list, schedule, or survey.

Id.

In other words, Congress excluded from evidence only reports, lists, schedules, and surveys – work product materials. This privilege extended only to those materials produced as a result of the federal grant for computerized record-keeping systems.

6. All fifty states received federal highway funds from 1966 to 1987.

From 1966 to 1987 each state was apportioned, on an annual basis, funds under the Federal-Aid Highway Act. Nothing in the federal statistics indicates the Secretary of Transportation reapportioned any state's federal highway funds because it had failed to comply with Section 402's data-gathering requirement. *See* U.S. DEPARTMENT OF TRANSPORTATION, TABLE FA-4, APPORTIONMENT OF FEDERAL-AID HIGHWAY FUNDS AND ALLOCATION OF OTHER FUNDS ADMINISTERED BY THE BUREAU OF PUBLIC ROADS (1966-1967); U.S. DEPARTMENT OF TRANSPORTATION, TABLE FA-4, APPORTIONMENT OF FEDERAL-AID HIGHWAY FUNDS AND ALLOCATION OF OTHER FUNDS ADMINISTERED BY THE FEDERAL HIGHWAY ADMINISTRATION (1968-1987).

7. In 1987 Congress enacted 23 U.S.C. § 409.

In 1987 Congress enacted 23 U.S.C. § 409. As originally enacted, that section provided:

> [R]eports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, . . . or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Pub. L. No. 100-17, 101 Stat. 170 (1987).

Nothing indicates Congress found any state had failed to comply with the data-gathering requirement of the Act. In other words, Congress nowhere found that its conditional allocation of funds had failed to induce 100% participation.[1]

Section 409 occupied less than half a page of Public Law 100-17, a measure totaling 129 pages in length. The

---

[1] Pierce County asserts that "Congressional funding alone was not sufficient to induce total participation." Pet. Br. at 3. There is simply no support for this assertion. There is no evidence that any state failed to provide the required traffic accident information. Pierce County has not identified a single state that has ever, since 1966, refused to participate in the federal highway aid program because it refused to comply with the accident information reporting requirement.

Senate nowhere discussed Section 409 during either the 99th or 100th Congress. The only legislative history regarding the enactment of Section 409 in 1987 is found in House Report 99-665. There, the concern was raised, with no evidence that it was justified, that the actual lists setting forth the priority of roadside or railroad-highway crossings should receive greater protection to encourage accuracy and completeness:

> This section prohibits the introduction into evidence of any priority listing of roadside or railroad-highway crossing hazards prepared pursuant to section 152 of title 23, U.S. Code (hazard elimination), and section 203 of the Highway Safety Act of 1973 (Railroad-Highway Crossings). This is to encourage greater accuracy and completeness in the compilation of such lists, by preventing these lists from being used in any judicial proceeding, thereby improving their quality as a basis for programming.

H. R. REP. No. 99-665 at 56 (1987).

Section 409 was but a small part of a large appropriations bill. As noted by Senator Moynihan:

> The 5-year reauthorization provides $68.6 billion in budget authority for the interstate construction to be completed, for continued maintenance, the interstate substitute program, and then, of course, the primary and secondary road programs, urban highway programs, bridge programs, and others.
>
> The bill provides more. It is, after all, a surface transportation act, not just a highway bill. In it

> you will find $18.9 billion for mass transit assistance, for a total of $87.5 billion.

133 CONG. REC. S3,480 (1986).

8. In 1991 Congress amended Section 409 to prevent discovery of the enumerated items.

In 1991 Congress amended Section 409 to prevent discovery of the items listed in the section. Once again, Congress made no findings regarding this amendment.

9. In 1995 Congress amended Section 409 to add the term "or collected."

In 1995 Congress amended Section 409 to include the term "or collected." The Conference Committee Report pertaining to all of the 1995 amendments to 23 U.S.C. totals 116 pages in length. *See* H.R. CONF. REP. No. 104-345 (1995). The 1995 amendments to Title 23 included provisions regarding funding, relief from mandates, traffic monitoring, call boxes, preventive maintenance, vehicle weight, toll roads, scenic byways, congestion mitigation and air quality improvement, operation of motor vehicles by intoxicated minors, alcohol-impaired driving countermeasures, use of recycled paving material, roadside barrier technology, high priority corridors, national recreation trails, intelligent transportation systems, accessibility of over-the-road buses to individuals with disabilities, alcohol and controlled substances testing, commercial motor vehicle safety pilot program, winter home heating oil delivery state flexibility program, moratorium on certain emissions testing requirements, state infrastructure bank pilot program, railroad-highway grade crossing safety, collection of bridge tolls, public use of rest areas,

safety belt use law requirements for New Hampshire and Maine, Orange County, California toll roads, and the Woodrow Wilson Memorial Bridge. *See id.*

The amended Section 409 is part of a bill entitled, variously, as the National Highway System Designation Act, the Highway Funding Restoration Act of 1995, National Highway System Designation Act of 1995, National Capital Region Interstate Transportation Authority Act of 1995, National Highway System Designation Act of 1995, Highway Funding Restoration Act of 1995, Federal Highway and Railroad Grade Crossing Safety Act of 1995, National Capital Region Interstate Transportation Authority Act of 1995, and the National Highway System Designation Act of 1995. The final bill, Senate Bill 440 that became Public Law 104-59, was the product of a seven-week long "committee on conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 440) to amend title 23, United States Code, to provide for the designation of the National Highway System, and for other purposes." 141 CONG. REC. S17,203 (1995). Senator Chafee, one of the conferees who negotiated the compromise bill, stated that "[t]he bulk of the matters were settled in the first week, but it was [a] billboard provision that held things up." *Id.* at S17,206.

The final bill contains 411 sections and consumes 66 pages in United States Code Congressional and Administrative News, 104th Congress, First Session, 1995. The amendment to Section 409 covers less than an inch of one page. Section 323 of the final bill is discussed briefly in the Conference Report, which both Houses passed:

DISCOVERY AND ADMISSION AS EVIDENCE OF CERTAIN REPORTS AND SURVEYS

Senate bill

The Senate bill contains no comparable provision.

House amendment

This provision amends section 409 of title 23, United States Code, to clarify that data 'collected' for safety reports or surveys shall not be subject to discovery or admitted into evidence in Federal or State court proceedings.

Conference substitute

The Conference adopts the House provision.

H.R. CONF. REP. No. 104-345 at 90 (1995).

As stated in the Conference Report, the Senate bill contained no comparable provision. In its consideration of the Conference Report, the Senate discussed many issues but never Section 409. Both senators from Washington discussed the report at length but neither senator mentioned Section 409. 141 CONG. REC. S17,209-10, S17,217 (1995). On November 17, 1995, the Senate adopted the Conference Report by a measure of 80-16. Of the Washington senators, Senator Murray voted in favor and Senator Gorton voted against the Conference Report. *Id.* at S17,209, S17,217.

The House version of this bill was reported to the House on September 14, 1995, along with a report from the Transportation Committee addressing Section 409 in its "section by section analysis:"

Sec. 328. Discovery and admission as evidence of certain reports and surveys

This section amends section 409 of title 23 to clarify that data "collected" for safety reports or surveys shall not be subject to discovery or admitted into evidence in Federal or State court proceedings.

This clarification is included in response to recent State court interpretations of the term "data compiled" in the current section 409 of title 23. It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mention [sic] or addressed in such data.

H. REP. No. 104-246 at 59 (1995).

The House voted on the final bill, H.R. 2274, on September 20, 1995. The Washington representatives voted in support of the Conference Report. *See* Roll Call no. 679, 141 CONG. REC. H9,257 *et seq.* (1995). Randy Tate, the only Washington representative on the House Transportation Committee and the House Subcommittee on Surface Transportation, remained entirely silent on any measure addressed by this bill. *See* 141 CONG. REC. H9,257-9,309 (1995).

The Congressional Record for the days on which this bill was considered reflects no discussion in the House regarding Section 409. *Id.* Instead, the discussion centered around removing state speed limit requirements and mandatory motorcycle helmet requirements as conditions

to obtaining federal highway funds and billboard limitations on scenic highways. *Id.*

Pierce County is correct that Congress passed the bill in which the current iteration of Section 409 appears by a large majority. The single vote, however, was on the 111-page bill. The amendment to Section 409 occupied a small portion of one page of the bill.

B. The underlying facts of this dispute.

On July 5, 1996, Clementina Guillen-Alejandre, the wife of Respondent Ignacio Guillen, was killed in an automobile accident at an intersection in Pierce County, Washington.

In attempting to investigate the facts about this intersection, Mr. Guillen requested information from Pierce County, invoking Washington's Public Disclosure Act, RCW 42.17. The County, however, produced no information, citing 23 U.S.C. § 409. JA 30-31. Mr. Guillen then modified his original request, specifically excluding any materials created by Pierce County for the purpose of seeking federal highway funding. JA 32-33. Pierce County, again citing 23 U.S.C. § 409, produced no information about the intersection. JA 34-35.

Mr. Guillen filed a lawsuit to compel production of the public records and conducted discovery in an effort to learn the nature of the documents withheld by Pierce County. The parties eventually filed cross motions to determine whether Pierce County was required to produce the requested documents. Although Pierce County eventually produced some of the requested documents, the trial court ordered production of five additional documents,

including accident reports, collision diagrams, and a draft letter written in 1989 by a public employee in response to a citizen's letter of concern regarding an accident at the subject intersection. *See Guillen v. Pierce County*, 982 P.2d 123, 126-27 (Wash. App. 1999). Pierce County sought review by the Washington State Court of Appeals.

While the first appeal was pending, Mr. Guillen filed a lawsuit against Pierce County for failing to use reasonable care in maintaining its intersection. During discovery, he requested (1) the identity of all County employees with knowledge of accidents at the intersection from 1990 to 1996, (2) the identity of all persons within the County's knowledge that have been involved in an accident at the intersection from 1990 to 1996, (3) the identity of all County sheriffs who patrolled the intersection from 1990 to 1996, (4) the identity of all accidents, persons involved, and fatalities at the intersection from 1990 to 1996, (5) photographs in the County's possession of accidents at the intersection from 1990 to 1996, (6) all written statements from witnesses to accidents at the intersection from 1990 to 1996, and (7) all accident reports regarding the intersection from 1990 to 1996. *See id.* at 127-28.

Pierce County produced none of the requested information. Guillen sought an order compelling Pierce County to produce the information. After the trial court granted Guillen's motion, Pierce County sought interlocutory review by the Washington State Court of Appeals.

C. Washington State has a strong public policy of holding state governmental entities accountable for their tortious conduct.

Washington has long protected the right of its citizens to bring actions against municipalities for failing to maintain reasonably safe public roads. As the Washington Supreme Court noted in its decision in this case, Washington statutes "evidence a strong public policy of holding governments accountable for their tortious conduct." *Guillen v. Pierce County*, 31 P.3d 628, 643 n. 19 (Wash. 2001). The Washington Supreme Court has repeatedly held that the state's municipalities have a duty to maintain their public roads and streets in a safe condition:

> "[T]he authority charged with the maintenance and repair of a [road] must use ordinary care to provide against such dangers to the traveling public as may reasonably be anticipated, having due regard to the character of travel, the incidental purposes for which the highway may be lawfully used, and the nature of possible danger at the point in question."

Berglund v. Spokane County, 103 P.2d 355, 358-59 (Wash. 1940) *quoting* 8 Am.Jur. 936 at § 38.

In order to prove a municipality's breach of this duty, the law requires a plaintiff to produce evidence not only showing that the subject roadway was dangerous, but also that the responsible municipality had actual or constructive notice of the hazard. *Russell v. City of Grandview*, 236 P.2d 1061, 1063 (Wash. 1940). Washington courts have also made it clear that such proof cannot be based on speculation or conjecture. *Ruff v. County of King*, 887 P.2d 886, 891 (Wash. 1995).

In virtually every case, accident data and history comprise the central evidence in establishing liability for negligent road maintenance cases. A traffic-engineering expert must rely on those data to evaluate whether the condition of a particular highway location or intersection presents an unreasonable danger. The duration of the danger frequently constitutes the only evidence available to a plaintiff to prove that a municipality had actual or constructive notice that a hazardous condition existed at a specific location.

Washington has adopted as law the standards and warrants set forth in the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD). *See* RCW 47.36.020; Chapter 468-95 WAC. These standards and warrants for eliminating dangerous conditions are based on traffic data applicable to a given roadway. If the responsible governmental entity could conceal accident data for a particular highway location, the public, including citizens injured at a hazardous location, could no longer prove that these governmental entities violated the law and thereby caused the injury. The public would not be able to hold a municipality accountable for breaching its duty or for failing to comply with applicable law requiring reasonably safe public roads.

SUMMARY OF ARGUMENT

A. 23 U.S.C. § 409 is ambiguous: its wording makes its intended scope unclear, various courts and entities have interpreted its scope differently, and its legislative history does not clearly indicate the intent of Congress. The one guiding principle to be applied in construing the

scope of Section 409, however, is that because it is a privilege in derogation of the truth, it must be construed restrictively. If this Court construes the statute restrictively and in a functional manner it will find the statute protects opinion evidence and any data generated by a state agency for the sole purpose of seeking federal highway funds. By so construing the statute, the Court will allow state agencies to set forth their opinions freely regarding hazardous intersections without fear that those opinions could later be used against them. It will also allow state agencies seeking federal highway funds to perform studies or generate data that could be used to assess the safety of an intersection without fear that the information they generated solely for that purpose could be used against them. This construction also allows states that have determined their citizens wish to hold their government accountable for improper maintenance of intersections to honor the wishes of their citizens.

B. Because Guillen has been directly and adversely affected by Section 409, he has standing to challenge its constitutionality. But for Pierce County's reliance on Section 409, Guillen already would have obtained the requested discovery and indeed, would have had this case tried by this date. In *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), this Court considered challenges by individuals that Congress exceeded its authority under the Commerce Clause in enacting certain federal statutes. Here, Guillen claims Section 409 exceeds the scope of Congress' authority under both the Spending Clause and the Commerce Clause. In addition, Guillen asserts that Section 409 violates the Tenth Amendment. Because the Tenth Amendment was enacted to protect individual citizens'

rights and because Guillen has been adversely affected by Section 409, he has standing to raise a Tenth Amendment challenge to the statute.

C. Congress exceeded its authority under the Spending Clause when it enacted 23 U.S.C. § 409. Under *South Dakota v. Dole*, 483 U.S. 203 (1987), Congress may enact conditional spending legislation, imposing otherwise unauthorized conditions on states, if it complies with three requirements. First, Congress must exercise its power under the Spending Clause in pursuit of the general welfare. Here, Congress made no findings to show Section 409 advanced the general welfare. Section 409 does not advance the federal government's interest in having states gather traffic-accident data, as the Federal-Aid Highway Act of 1966 already encouraged compliance – any state refusing to comply would suffer a severe reduction of federal highway funding. There is no evidence any state failed during the ensuing twenty-one years to comply with the traffic-accident data requirement of the 1966 Act. There is likewise no evidence that Section 409 further encouraged states to gather traffic-accident data. Section 409 does nothing to advance the general welfare. For that reason alone, Congress exceeded its authority under the Spending Clause.

The second requirement of *Dole* is that Congress must condition receipt of federal funds unambiguously, enabling states to exercise their choices knowingly, aware of the consequences of their participation. Section 409, however, is ambiguous. Different state courts and different entities have interpreted Section 409 in different ways. Neither the original statute nor the 1995 amendment inform states they must comply with the statute to receive federal highway funds. Neither the original statute nor the 1995

amendment require states to amend their laws to comply with a federal condition. Section 409 does not meet the second *Dole* requirement.

The third requirement of *Dole* is that a condition must be related to the federal interest in a particular national project or program. Section 409 is unrelated to the purposes of the federal highway program because it does not promote the 1966 Act's objective of obtaining safer roads. Because there is no relation between Section 409 and the goals of the federal-aid highway program, Section 409 fails to meet the third *Dole* requirement.

D. In order to comply with the Commerce Clause, federal legislation must regulate economic or commercial activities substantially affecting interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995). State judicial rules regarding discovery and admissibility of evidence for state causes of action are not economic or commercial in nature. Indeed, the hallmark of state sovereignty is the authority of states to determine their own rules regarding state judicial proceedings. Section 409 in no way relates to economic or commercial activities and Congress had no authority under the Commerce Clause to enact it.

ARGUMENT

A. 23 U.S.C. § 409 is an ambiguous statutory privilege that must be construed narrowly.

Pierce County contends Section 409 is unambiguous. Pet. Br. at 38. That contention, however, is belied (1) by case law, as different courts have interpreted Section 409 in vastly different ways, (2) by the fact that the Washington State Supreme Court justices interpreted Section 409

differently among themselves, and (3) by the fact that the Solicitor General interprets Section 409 differently than does Pierce County. The Court must construe this ambiguous statute.

In construing any privilege, this Court has adhered to one central tenet: because privileges are in derogation of the truth, they must be construed restrictively. *Baldrige v. Shapiro*, 455 U.S. 345, 360 (1982); *United States v. Nixon*, 418 U.S. 683, 709-10 (1974).

Construing Section 409 restrictively, the issue becomes whether the Act only privileges documents actually compiled or collected by state agencies seeking federal highway funds or whether it has a broader reach. Accordingly, there are four possible ways to construe Section 409: (1) it only applies to reports, surveys, lists, and data that a state agency actually prepares itself to seek federal highway funds; (2) in addition to the above, it applies to all data that the agency has in its possession whether it generated those data itself or received them from another agency; (3) in addition to numbers one and two, it applies to all documents, wherever located, that contain the data used by the agency seeking federal highway funds; (4) in addition to numbers one through three, it provides immunity from discovery or admission into evidence the knowledge of others that may be based on those documents.

The County relies primarily on two cases to support its argument that Section 409 should be interpreted to provide the broadest possible immunity: *Newman v. King County*, 947 P.2d 712 (Wash. 1997) and *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989). However, *Newman* is a Washington State Supreme Court case that followed the principles set forth in *John Doe Agency*. As this Court

must construe Section 409, a federal statute, *John Doe Agency*, and not *Newman*, is the case that provides guidance.

In *John Doe Agency*, the John Doe corporation was in 1985 the subject of a grand jury fraud investigation. *John Doe Agency*, 493 U.S. at 149. The corporation made a request under the Freedom of Information Act, seeking disclosure of 1978 correspondence regarding an audit into its accounting practices. *Id.* The agency in possession of the documents denied the request and two days later sent the documents to the FBI. *Id.* The corporation renewed its FOIA request but directed it to the FBI. *Id.* The FBI denied the request citing Exemption 7(a) of FOIA. *Id.*

This Court noted that despite the underlying purpose of FOIA of an informed citizenry and a basic policy of disclosure rather than secrecy, the statutory exemptions must have meaningful reach and application. *Id.* at 152. It acknowledged that Congress realized legitimate governmental interests could be harmed by release of certain types of information. *Id.* It further recognized Congress sought to reach a workable balance between the right of the public to know and the need of the government to keep information in confidence without permitting indiscriminate secrecy. *Id.*

The specific exemption at issue in *John Doe Agency* protected records or information compiled for law enforcement purposes. *See* 5 U.S.C. § 552(b)(7). In construing that exemption, this Court noted that FOIA was not intended to supplement or displace rules of evidence. *Id.* at 153.

This Court held that the exemption included the documents requested by the corporation, concluding the

FBI need not actually have created the documents in order to gain the protection of the statute. However, the Court made it clear that it construed the statute under circumstances that were unique to the FOIA setting:

> This Court consistently has taken a practical approach when it has been confronted with an issue of interpretation of the Act. It has endeavored to apply a workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure. The Court looks to the reasons for exemption from the disclosure requirements in determining whether the Government has properly invoked a particular exemption. In applying Exemption 7, the Court carefully has examined the effect that disclosure would have on the interest the exemption seeks to protect. The statutory provision that records or information must be "compiled for law enforcement purposes" is not to be construed in a nonfunctional way.

Id. at 157 (citations omitted).

Here, by construing Section 409 so that it protects only reports, surveys, lists, and data actually generated by a state agency seeking federal highway funding, the Court would not only accomplish the goals of the Act but also would adhere to the principle of restrictive construction. In other words, the Court would construe the statute in a functional way. On the facts of this case, such a construction would allow the State of Washington freely to state its opinions and conclusions regarding the hazard an intersection poses without having those opinions and conclusions discoverable by an accident victim. It would protect data gathered specifically for federal highway funding

from discovery or admission into evidence. At the same time, it would recognize that the State of Washington generates traffic accident data independently of federal funding purposes and indeed has done so for sixty-five years. It would allow Guillen to obtain all the materials he sought in discovery, thereby making it unnecessary for this Court to decide the constitutionality of Section 409.[2]

Alternatively, this Court could take a slightly broader approach in interpreting Section 409. The Court could interpret Section 409 so that it protects data the agency seeking federal highway funding did not itself create but simply obtained from other sources. This would prevent a plaintiff from obtaining documents in the possession of a state agency seeking federal highway funds but would not preclude discovery of traffic accident data from other governmental agencies.[3] The defect with this approach is that it does not follow the precept that privileges are to be construed narrowly. However, it does follow the statutory

---

[2] This narrow construction harmonizes Section 409 with 23 U.S.C. § 402. Section 402(a) requires the states to "collect [ ] and report [ ] . . . data on traffic-related deaths and injuries. . . . " It appears that Washington, along with other states, collects traffic accident reports pursuant to Section 402. Thus, the accident reports withheld from discovery are not collected "pursuant to" Section 152 and are not shielded by Section 409.

[3] This is the current interpretation of Section 409 by the Alabama Supreme Court. *See Ex Parte Alabama Dep't of Transp.*, 757 So.2d 371 (Ala. 1999) (holding plaintiff may obtain requested information from Alabama Department of Public Safety). This is also the interpretation that the Solicitor General has taken regarding Section 409, Solicitor General's Br. at 35-45, the interpretation by the concurring opinion by the Washington State Supreme Court justices in *Guillen v. Pierce County*, 31 P.3d 628 (Wash. 2001), and by the Washington State Court of Appeals, *Guillen v. Pierce County*, 982 P.2d 123 (Wash. App. 1999).

construction of the term "compiled" found in *John Doe Agency*. If the Court construes the statute in this fashion, then a remand would be necessary to determine which specific discovery requests would be precluded and which would still be allowed. Under this approach, the Court would have to decide the constitutionality of Section 409.

The Court could also take a third approach in construing Section 409. Under this approach, the Court could rule Section 409 covers not only documents actually possessed by the agency seeking federal highway funds, but also the originals of those documents that were initially generated by another state agency for purposes other than obtaining federal highway funding. Applying this approach, the Court would bar a plaintiff from obtaining discovery of traffic accident data not only from the state agency seeking federal highway funds, but also from law-enforcement agencies that were the original source of that information.[4] Such a construction would disregard the rule that a privilege is to be restrictively construed. As above, if the Court construes the statute in this fashion, then a remand would be necessary to determine which specific discovery requests would be precluded and which would still be allowed. Under this approach, the Court would have to decide the constitutionality of Section 409.

Finally, the Court could adopt a fourth approach in construing Section 409. Under this approach, urged by Pierce County, not only is any document that finds its way into the possession of an agency seeking federal highway

[4] This is the interpretation given to Section 409 by the Washington State Supreme Court.

funds privileged, and not only are the originals of those documents in the possession of other agencies that created those documents for purposes other than federal highway funding privileged. The privilege also would prevent the testimony of any person who may have gained any information by way of those documents. Under this construction, a plaintiff would be precluded from having law enforcement officers testify about their knowledge of prior accidents.[5] Such a construction completely disregards the precept that privileges are to be construed narrowly. If this construction is adopted, no remand is necessary as Guillen would not be entitled to any of the discovery sought. Under this approach, the Court would have to decide the constitutionality of Section 409.

Construing Section 409 under either the first or second options is reasonable, follows rules of statutory construction, and construes the Act in a functional manner. The first option alone, however, recognizes and gives meaning to this Court's time-honored doctrine of constitutional avoidance. Any other construction ignores the central tenet that privileges are to be construed restrictively. And any other construction requires this Court to decide the constitutionality of an ambiguous statute, a result it studiously avoids. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also United States v.*

[5] This is the construction being applied by Pierce County, as it has refused to answer discovery as to law enforcement officers who have knowledge of prior accidents or indeed who even patrolled the intersection in question.

Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494 (2001).

B. Guillen has standing to challenge the constitutionality of Section 409.

The County contends that an individual who has, by virtue of a federal statute, been denied discovery of information to which he otherwise would have access in a state cause of action lacks standing to argue the statute exceeds Congress' Article I authority.

> Pierce County begins its argument by representing:
>
> > [T]his honorable Court held that "absent the states or their officers, [individuals] have no standing . . . to raise any question under the [tenth] amendment."

Brief of Petitioner at 21 *citing Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 144 (1939). This is false. Pierce County replaced the word "appellants" with the word "individuals," entirely changing the meaning of the quoted passage. *Tennessee Electric Power* did not hold that individuals never have standing to raise any question under the Tenth Amendment. Instead, *Tennessee Electric Power* held that the appellants had no standing *in that case*.

In *Tennessee Electric Power*, the appellants were fourteen companies that generated and distributed electricity in numerous southern states. The companies filed an action against the TVA because it would be providing electricity in competition with them. According to the companies, the plan creating the TVA violated the Fifth, Ninth, and Tenth Amendments because

> the sale of electricity on the scale proposed will deprive the appellants of their property without due process of law, will result in federal regulation of the internal affairs of the states, and will deprive the people of the states of their guaranteed liberty to earn a livelihood and to acquire and use property subject only to state regulation.

Tennessee Electric Power, 306 U.S. at 136.

This Court began its analysis by recognizing that while the appellants each were awarded franchises by various states to operate utilities, none of them were granted the right to be free from competition. *Id.* at 139. The Court accordingly held that the appellants had no legal cause of action merely because a state subsequently authorized the TVA to enter and operate in the same field. *Id.*

The appellants argued that if their franchise rights did not give them standing, they could nonetheless challenge the constitutionality of the grant of power creating the TVA because the TVA would be in competition with them. *Id.* at 139-40. This Court once again held that an entity cannot bring an action against another based on the fact that the other will compete with it where the competition is otherwise lawful. *Id.* at 140.

The passage quoted by Pierce County appears at pages 143 and 144 of the Court's opinion. The appellants had argued they had standing to challenge the constitutionality of the act creating the TVA, as the act allowed the federal government to regulate purely local matters. The Court characterized the appellants' argument thus: because the TVA sold electricity at lower rates than the appellants, those sales resulted in an

indirect regulation of appellants' rates. *Id.* at 143. The Court rejected that argument, noting that under that same analysis, any competition would indirectly regulate rates. In the Court's view, this effect was nothing more than an incident of competition. *Id.* at 144. This Court then stated:

> The sale of government property in competition with others is not a violation of the Tenth Amendment. As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment.

Id.

In contrast to the portion of the opinion quoted by the County, the full text demonstrates that this Court simply held that "in this suit" the appellants, whose sole complaint was that the TVA would sell electricity more cheaply than they would, had no standing to challenge the creation of the TVA. The Court never broadly held that "individuals" never have standing to raise issues under the Tenth Amendment.

In deciding whether a party has standing to assert a claim, this Court asks whether the litigant is entitled to have a court decide the merits of the dispute or particular issue. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). This Court has stated:

> The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the plaintiff but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct.

Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72 (1978) (citations omitted).

Pierce County's argument would have some weight if someone other than Guillen argued Section 409 violated the Spending and Commerce Clauses. That, however, is not the case. Guillen has suffered an actual injury: he has been unable to obtain information to which he otherwise would be entitled but for Section 409.

In recent cases, this Court has allowed a litigant to argue that a federal statute imposing criminal sanctions for possessing a gun within a school zone[6] and providing a civil remedy for gender-motivated violence[7] exceeded Congress' authority under the Commerce Clause. In those cases, individuals were subject to direct consequences as a result of those Acts. Here, Guillen is subject to a direct consequence as a result of the application of Section 409: the inability to discover, or have admitted at time of trial, certain evidence to which he otherwise would be entitled.

---

[6] *See United States v. Lopez*, 514 U.S. 549 (1995).

[7] *See United States v. Morrison*, 529 U.S. 598 (2000).

Guillen is adversely affected by the consequences of Section 409. As such, he has standing to challenge the validity of the statute.

C. Section 409 exceeds Congress' power under the Spending Clause.

In *South Dakota v. Dole*, 483 U.S. 203 (1987), South Dakota challenged 23 U.S.C. § 158. That statute directed the Secretary of Transportation to withhold 5% of federal highway funds from any state that allowed persons younger than twenty-one to purchase or possess alcohol. *Dole*, 483 U.S. at 205. There, Congress had found that the differing drinking ages among the states created incentives for young people to combine drinking and driving. *Id.* at 208. Unlike here, in enacting Section 158 Congress did not directly raise the minimum drinking age for any state accepting federal highway funds. Instead, Congress respected the sovereignty of each state legislature to determine whether the condition was acceptable.

In *Dole*, this Court held that the authority of Congress under the Spending Clause is limited by four restrictions.[8] First, Congress must exercise its power under the Spending Clause in pursuit of the general welfare. *Id.* at 207. Second, if Congress wishes to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choices knowingly, cognizant

[8] In fact, there is arguably a fifth restriction set forth in *Dole*. This Court states that under some circumstances the financial inducement offered by Congress may be so coercive as to pass the point at which pressure turns into compulsion. *Dole*, 483 U.S. at 211.

of the consequences of their participation. *Id.* Third, Congress may not impose conditions on federal grants that are unrelated to the federal interest in a particular national project or program. *Id.* Fourth, other constitutional provisions may provide an independent bar to the conditional grant of federal funds. *Id.* at 208.

In *Dole*, the Court held that Congress had the authority under the Spending Clause to enact 23 U.S.C. § 158. According to the Court, the Act was in pursuit of the general welfare, the conditions imposed by the Act "could not be more clearly stated by Congress," *id.* at 208, and even South Dakota could not argue that the condition was unrelated to a federal purpose – safe interstate travel. *Id.*

Because there is absolutely no evidence that states were not complying with the information gathering requirement of the 1966 Highway Safety Act, Congress exceeded its authority under the Spending Clause when it enacted Section 409. There is no evidence that Section 409 serves the general welfare. The conditions set forth in Section 409 are ambiguous. Finally, the conditions imposed by Section 409 are unrelated to any federal interest, i.e., unrelated to the requirement that states gather the data mandated by the 1966 Act.[9]

[9] Moreover, unlike the statute at issue in *Dole*, Section 409 is not a "condition" on spending, instead applying "[n]otwithstanding any other provision of law. . . . " It fails constitutional muster under the Spending Clause for this reason alone, as explained in the brief of Amici Whitmers at 18-20.

1. Section 409 was not enacted to further the general welfare.

No one disputes that the goal of the 1966 Highway Safety Act is safe interstate travel. There is also no dispute that Congress determined in 1966 that requiring states to keep traffic-accident data would help achieve that goal. There should also be no dispute that Congress achieved that goal by threatening to withhold federal funds from states that failed to collect the required traffic-accident data.

Because every state had fully complied with the federal requirements, Section 409, by definition, was not enacted to further that goal. While there was undoubtedly a purpose behind the enactment of Section 409, the legislative record remains largely silent. The only thing for certain is that the purpose was unrelated to obtaining traffic-accident data from the states. The federal government was already obtaining those data. Accordingly, and especially where the Congressional record sheds no light on this issue, there is nothing to support a decision that Congress enacted Section 409 to further the general welfare.[10]

---

[10] The only support that Pierce County can cite for its assertion that "Congressional funding alone was not sufficient to induce total participation" (County's brief at 3) is a 1983 memo from Marshall Jacks, Jr., the then Associate Administrator for Safety, Traffic Engineering, and Motor Carriers to Mr. D. L. Ivers, Chief Counsel. In that memorandum, it was Mr. Jacks' opinion (although admittedly it is stated as a fact) that

> It has been consistently brought to our attention that highway departments are reluctant to undertake such efforts (as required in 23 USC 152 for instance) for fear that acknowledging the existence of hazardous conditions would expose

(Continued on following page)

If the general welfare requirement restricts the conduct of Congress at all, then there must be something upon which this Court may base such a finding. Here, there is nothing. For that reason alone, Congress exceeded its authority under the Spending Clause by enacting Section 409.

2. Because the conditions imposed by Section 409 are ambiguous, the statute fails to meet the second *Dole* requirement.

In *Dole*, this Court held that:

> if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."

> them to liability. The issue has once more been raised, this time by the American Association of Railroads. . . .

(State of Louisiana's Br., Appendix "A" at 1-2.) To make the stretch that Congress ever reached the conclusion that states were not complying with the data-gathering requirement of the 1966 Highway Act based upon this memo is indeed too large. First, there is no evidence that this memo ever was seen, much less considered, by the House of Representatives. Second, Jacks nowhere asserts that highway departments are not complying with the federal mandate, only that they are allegedly "reluctant" to do so. Third, even Jacks does not propose that all "data" be withheld, but instead only "no report, list, schedule or survey compiled by or for a State" should be admitted into evidence. Fourth, there is nothing in the Congressional record indicating any state had not complied with the data-gathering requirement. Fifth, all states apparently complied with the requirement as no state was ever denied funding based on non-compliance. Sixth, there is no Congressional finding one way or the other regarding Jacks' opinion. Pierce County is making an assumption, one that is belied by the record.

Dole, 483 U.S. at 207 (alterations in original). Here, the 1995 amendment fails to meet this requirement.

In *Dole*, the statute, when enacted, clearly put the South Dakota legislature on notice of what was required of it: amend its own laws to raise the minimum legal drinking age to twenty-one. If South Dakota was unwilling to do that, the statute was very clear as to what would occur: South Dakota would lose five percent of its federal funding for highway improvements.

The law in *Dole* was unambiguous. It allowed the South Dakota legislature to exercise its choice. It clearly informed the citizens of South Dakota what would happen if they failed to change their minimum drinking age law.

Here, in enacting Section 409, Congress nowhere stated the conditions with which states must comply before receiving federal highway funds. Section 409 is anything but a model of clarity. From the moment courts began construing Section 409 to the present, different courts have interpreted it differently. The Solicitor General interprets Section 409 differently than Pierce County. The Washington Court of Appeals interprets it differently than the Washington Supreme Court. Of the nine Washington State Supreme Court justices, three interpreted Section 409 differently than the other six. The Washington State Supreme Court interpreted Section 409 differently than other state courts. By definition, Congress failed to meet the second *Dole* requirement in enacting Section 409: the section and its amendments are ambiguous and have been interpreted differently by different entities since its initial enactment.

As a corollary to the clarity requirement, Congress nowhere provided the states an opportunity to accept or

reject Section 409 in a clear manner. Section 409 was not part of the 1966 Highway Safety Act as enacted in 1966. Rather, it was not enacted for another twenty-one years. It has since been amended twice: once in 1991 and once in 1995. There is no language in Section 409 putting the states on notice that they would lose federal funding if they failed to abide by its provisions. There is no requirement in Section 409 that the state legislatures, as in *Dole*, enact legislation specifically adopting the restrictions on discovery and admissibility of certain evidence in state court proceedings. In short, Congress, in enacting Section 409 and its amendments, failed to meet the second *Dole* requirement. For that reason alone, Section 409 violates the Spending Clause requirements.

Pierce County claims Washington assented to Section 409 when it enacted RCW 47.04.050.[11] That is incorrect. As a matter of law, Washington State could not assent to Section 409 by enacting RCW 47.04.050 in 1961 – twenty-six years before Section 409 was even enacted. If Pierce County were to properly analyze this issue, instead of simply proclaiming that Washington assented to Section 409, it would have to analyze whether a state may prospectively assent to a federal statute.

RCW 47.04.050 provides:

> The state of Washington hereby assents to the purposes, provisions, terms, and conditions of the grant of money provided in an act of congress

[11] Amicus Product Liability Advisory Council goes further and claims that the Washington legislature "expressly" assented to the terms of § 409. Product Liability Advisory Council Br. at 12, n. 4.

> entitled: "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," approved July 11, 1916, and all acts, grants and appropriations amendatory and supplementary thereto and affecting the state of Washington.

This statute was originally enacted in 1917 and subsequently amended in 1937 and 1961.[12]

As a starting point for the analysis, the Washington legislature never expressly assented to the specific terms of Section 409 – RCW 47.04.050 was last amended twenty-seven years *prior to* Section 409's adoption.

Since Section 409 did not exist when RCW 47.04.050 was last amended, and since it cannot be disputed that Section 409 fundamentally alters the terms and conditions of the Highway Safety Act as it existed in 1961, the question is whether the Washington Legislature could agree to accept future conditions imposed by Congress. Under Washington law, the answer is no.

---

[12] In 1917 the statute read: "The State of Washington hereby assents to the purposes, provisions, terms and conditions of the grant of money provided in an act of Congress entitled 'An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' approved July 11, 1916." In 1937 the statute read: "The State of Washington hereby assents to the purposes, provisions, terms and conditions of the grant of money provided in an act of Congress entitled: 'An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' approved July 11, 1916, and all acts, grants and appropriations amendatory and supplementary thereto and affecting the State of Washington."

The Constitution of Washington provides:

> The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington. . . .

Wash. Const., Art. 2, § 1.

The Washington legislature is prohibited from delegating its purely legislative functions. *Diversified Investment v. DSHS*, 775 P.2d 947, 950 (Wash. 1989). Accordingly,

> It is well settled in Washington that the Legislature may not constitutionally attempt to adopt future federal law by statute.

Id. at 25.

Washington is in accord with other states that have found it unconstitutional for a state legislature to attempt to assent to future federal laws. *See, e.g., State v. Carswell*, 557 So.2d 183, 184 (Fla. 1990) ("unlawful to delegate legislative power to enact a statute which incorporates by reference federal law and regulations which will arise in the future"); *State v. Rodriguez*, 379 So.2d 1084, 1086 (La. 1980) ("Louisiana legislature is not authorized to delegate its legislative power to . . . Congress"); *State v. Johnson*, 173 N.W.2d 894, 895 (S.D. 1970) ("attempted adoption of future laws, rules or regulations of . . . the federal government . . . generally have been held unconstitutional").

Under Washington law, if the Washington legislature intended to prospectively assent to any condition Congress could impose, then such an attempt would be an unconstitutional delegation of power.

3. Section 409 is not a reasonable condition that is relevant to the federal interest at stake in the 1966 Highway Safety Act.

The third *Dole* restriction on Congress' power under the Spending Clause requires any condition on federal grants to be related to the federal interest in particular national projects or programs. *Dole*, 483 U.S. at 207. In *Dole*, this Court did not determine how direct a condition must be to satisfy this requirement. *Id.* at 208 n. 3. Regardless of how direct the condition must be, the condition in this case fails to meet this requirement.

Here, there is simply no known reason related to highway safety for Congress to enact Section 409. The federal purpose underlying the Highway Safety Act was safe highways and roadways. In order to achieve that goal, Congress required states to develop a program of documenting accidents on its roadways. If states failed to comply with that condition, then they would lose their federal highway funding. The states, under the 1966 Act, could either accept that condition or reject that condition. Section 409, enacted twenty-one years later, did not further the goal of promoting safe highways and roadways. This is particularly true where nothing indicates states were not complying with the information gathering requirement. Section 409 fails to meet the third *Dole* requirement.

D. Section 409 exceeds Congress' power under the Commerce Clause.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court recognized that:

> "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties."

Lopez, 514 U.S. at 552 (citations omitted).

> "[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

Id. quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

> [T]he scope of interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a complex centralized government.

Id. at 557 *quoting N.L.R.B. v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937).

Consistent with that structure, this Court has identified three broad categories of activity that Congress may regulate under the Commerce Clause. First, Congress may regulate channels of interstate commerce. Second, Congress may regulate and protect the instruments of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Third, Congress may regulate those activities that have a substantial relationship to interstate commerce. *Lopez*, 514 U.S. at 558-59.

The first issue here is whether Congress has authority under the Commerce Clause to regulate state court proceedings as they affect state causes of actions. State court proceedings are not channels of interstate commerce. Thus, the first category does not apply.

The next question is whether, by regulating state court proceedings, Congress is attempting to protect an instrument of interstate commerce. An instrument of interstate commerce, as the County and its amici argue, would be highways and roads themselves. Section 409 does not protect highways or roads. In fact, as pointed out earlier, the amendment does nothing to further the regulatory goal of promoting safe highways.

Accordingly, the only question is whether state court proceedings substantially affect interstate commerce.

In *Lopez*, this Court reviewed situations in which it upheld congressional acts as proper under the Commerce Clause. *See Lopez*, 514 U.S. at 559-60 *citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) (regulation of intrastate coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (intrastate extortionate credit transactions) *Katzenbach v. McClung*, 379 U.S. 294 (1964) (restaurants using substantial interstate supplies); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (inns and hotels catering to interstate guests); and *Wickard v. Filburn*, 317 U.S. 111 (1942) (production and consumption of wheat). After completing its review, this Court held:

> Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Lopez, 514 U.S. at 560.

Applying this tenet, the *Lopez* Court held that Congress exceeded its authority under the Commerce Clause when it enacted the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A). The Court noted that Section 922(q) was a criminal statute that by its terms had nothing to do with commerce or any sort of economic enterprise. *Id.* at 561. This Court further noted that Section 922(q) was not an essential part of a larger regulation of economic activity where the regulatory scheme would be defeated unless the intrastate activity were regulated. *Id.*

The same is true here. State court proceedings are not economic activity. As in *Lopez*, "neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus." *Id.* at 611. Section 409 does not regulate commercial or economic activity. Instead, it regulates judicial proceedings. While those judicial proceedings may ultimately have economic effect, that type of tangential effect is an insufficient basis for Congress to exercise its Commerce Clause authority:

> In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.

Id. at 580 (Kennedy, J., concurring). In every case in which this Court has sustained a federal regulation under the aggregation principle, the regulated activity was of an apparent commercial character. *United States v. Morrison*,

529 U.S. 598, 672, n. 4 (2000). Judicial proceedings are not commercial activities.

In *United States v. Morrison*, 529 U.S. 598 (2000), the Court made clear that Congress may exercise its authority under the Commerce Clause only to regulate commercial or economic conduct. There, Morrison challenged the constitutionality of Section 13981 of the Violence Against Women Act of 1994, 42 U.S.C. § 13981(b). The Act allowed a person who was the victim of a crime of violence motivated by gender the right to recover damages against the perpetrator. Morrison, a defendant in an action under the Act, argued Congress exceeded its authority under the Commerce Clause by enacting the statute.

This Court noted that Congress had made specific findings that gender-motivated violence affected interstate commerce. Nevertheless, the Court held that congressional findings are not, by themselves, sufficient to sustain the constitutionality of Commerce Clause legislation. *Id.* at 614. Instead, this Court must determine whether the activity Congress seeks to regulate under the Commerce Clause affects interstate commerce. *Id.*

The *Morrison* Court held Congress had exceeded its authority under the Commerce Clause by attempting to regulate non-economic, criminal conduct based solely on that conduct's aggregate effect on interstate commerce. *Id.* at 617. This Court noted that if the federal government were allowed to use its Commerce Clause authority in such a manner, then it could regulate "other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Id.* at 615-16.

As in *Morrison*, state judicial proceedings are neither economic nor commercial activities. Instead, they are a defining aspect of state sovereignty.[13] States, not the federal government, have the power to determine their rules of discovery and rules of evidence:

> [W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion."

Patterson v. New York, 432 U.S. 197, 201 (1977) *quoting Speiser v. Randall*, 357 U.S. 513, 523 (1958).[14]

---

[13] Pierce County argues that this Court upheld the federal government's "abolition" of a state tort by federal regulation in *Norfolk Southern Ry. v. Shanklin*, 529 U.S. 344 (2000) and thus Congress does not violate the Tenth Amendment by dictating prohibitions regarding discovery and evidence for a state court cause of action. *Shanklin*, however, did not raise Tenth Amendment issues or even issues under the Spending or Commerce Clauses. Instead, this Court, following the precedent of *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), held that a plaintiff could not hold a railroad company liable for an accident where the plaintiff alleges that the signage used at a crossing was inadequate where the type of sign placed at the crossing was dictated by federal regulations and those regulations deemed the sign adequate. Here, there is no indication that Congress intended to preempt the state tort cause of action for negligent maintenance of a county street intersection.

[14] Additionally, despite the County's arguments, Section 409 cannot be justified as an "integral" part of a complex regulatory program. *See* Whitmer Br. at 14-17.

Congress exceeded its authority under the Commerce Clause when it enacted Section 409.[15]

CONCLUSION

Pierce County admits the Washington Supreme Court struck down the 1995 amendment to 23 U.S.C. § 409 because it violated principles of dual sovereignty implicit in the Constitution and explicit in the Tenth Amendment. Pet. Br. at 17. Yet the County contends the 1995 amendment raises no Tenth Amendment issues. Despite Pierce County's wishes, a statute prohibiting a state from exercising its sovereign powers to regulate discovery and admissibility in state court proceedings for a state cause of action goes to the heart of the Tenth Amendment. This case goes to the heart of the constitutional framework.

As this Court acknowledged in *Printz*:

> [T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other" – "a

[15] Pierce County is apparently arguing that the Necessary and Proper Clause of Article I, Section 8 of the Constitution provides an independent basis for Congress' enactment of Section 409. But Pierce County misunderstands the basic nature of that clause. The Necessary and Proper Clause does not provide an independent basis of constitutional authority. Instead, Congress must have underlying Article I authority to enact a law. If that authority exists, then the Necessary and Proper Clause grants the power for carrying it out. *Printz v. United States*, 521 U.S. 898, 923 (1997).

> legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. . . .
>
> This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

Printz v. United States, 521 U.S. 898, 920-21 (citations omitted).[16]

Here, Congress dictates to Washington State what evidence state court litigants may discover and admit in state courts in state causes of actions. One defining characteristic of a state acting as a state is the authority to determine its own rules of procedure and rules of evidence for state causes of actions:

> No one disputes the general and unassailable proposition . . . that States may establish the

[16] Although Congress has power to regulate only individuals and not states, *Printz*, 521 U.S. at 920, Section 409 operates directly on the judicial branch of each state in the Union. As pointed out by Amici Whitmers, Congress exceeded its constitutional authority by imposing this regulatory scheme directly on the states.

rules of procedure governing litigation in their own courts.

Felder v. Casey, 487 U.S. 131, 138 (1988). Unlike other cases that have asked whether an activity has traditionally been a state function, *see, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (disputing whether mass transit has historically been privately or state-run activity), there should be no dispute that state court proceedings for state causes of action regarding state actors are one of the core functions of state government.

This case is almost the polar opposite of *Dole*. In *Dole*, Congress made findings that drivers under the age of twenty-one who consumed alcohol posed a threat not only to their own safety but also to the safety of others. Congress expressly found that drivers under the age of twenty-one who resided in states where the minimum drinking age was twenty-one years would drive to neighboring states with lower drinking ages. Thus, states where the minimum drinking age was twenty-one were powerless to protect their own citizens against this hazard. Accordingly, even though setting the age at which its citizens may lawfully consume alcohol may be a state function, it was a proper use of Congress' power under the Spending Clause to entice states to raise their minimum drinking age for the safety of those living in other states.

Here, there was no evidence, and certainly no Congressional finding, that any state had failed to comply with the 1966 Highway Safety Act's information gathering requirement. But even if there were such a finding, it does not justify a law changing state rules of discovery and evidence. Under our dual system of government, states retain the ability to protect themselves if they feel threatened by gathering this information. They have the option

of refusing to participate in the federal-aid highway program. Or, more fundamentally, they had the authority to enact state laws prohibiting discovery or admissibility of such evidence within their own court system. Unlike *Dole*, where an individual state's decision regarding its alcohol-consumption laws had a direct effect on neighboring states with differing age limits, a state's decision regarding the discovery or admissibility of traffic-accident data has nothing but the most remote effect upon any neighboring states.

The Tenth Amendment exists to protect the political process. When Congress enacted Section 409, changing state rules of procedures and evidence for state causes of actions, it subverted the political process. And more importantly, state governments lost accountability to their own citizens. Given the manner in which Congress enacted Section 409, citizens lost the ability to hold their state governments accountable for the way their state causes of actions would be determined in their own state courts.

Respectfully submitted,

SALVADOR A. MUNGIA
WSBA #14807
Counsel of Record
DARRELL L. COCHRAN
WSBA #22851
J. BRADLEY BUCKHALTER
WSBA #29295
1201 Pacific Avenue
Suite 2200
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

Counsel for Respondents

Supreme Court, U.S.
FILED
SEP 25 2002
OFFICE OF THE CLERK

No. 01-1229

In the Supreme Court of the United States

PIERCE COUNTY, PETITIONER

v.

IGNACIO GUILLEN, LEGAL GUARDIAN OF JENNIFER GUILLEN AND ALMA GUILLEN, MINORS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

KIRK K. VAN TINE
General Counsel
Department of Transportation
Washington, D.C. 20590

TABLE OF CONTENTS

	Page
A. The scope of Section 409	1
1. Purpose and proper construction of Section 409	1
2. Respondents' construction of Section 409	2
3. Petitioner's construction of Section 409	5
B. The constitutionality of Section 409	8
1. Spending Clause	8
2. Commerce Clause	15
3. Tenth Amendment	16

TABLE OF AUTHORITIES

Cases:

Bennett v. *Kentucky Dep't of Educ.*, 470 U.S. 656 (1985)	12
Davis v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)	12
Dice v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952)	19
Felder v. *Casey*, 487 U.S. 131 (1988)	19
John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989)	3, 5
Light v. *State*, 560 N.Y.S.2d 962 (Ct. Cl. 1990)	6
Miller v. *French*, 530 U.S. 327 (2000)	4
New York v. *United States*, 505 U.S. 144 (1992)	11, 17, 18
Oklahoma v. *United States Civil Serv. Comm'n*, 330 U. S. 127 (1947)	17-18
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981)	11, 12
Printz v. *United States*, 521 U.S. 898 (1997)	18
Reno v. *Condon*, 528 U.S. 141 (2000)	18
Robertson v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992)	17
Rust v. *Sullivan*, 500 U.S. 173 (1991)	4

Cases—Continued: Page

Salinas v. *United States*, 522 U.S. 52 (1997) 12, 17
South Dakota v. *Dole*, 483 U.S. 203 (1987) 8, 14, 15, 17
Stone v. *INS*, 514 U.S. 386 (1995) 4
Turner Broad. Sys., Inc. v. *FCC*, 520 U.S. 180 (1997) 10
United States Dep't of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) 6
United States v. *Lopez*, 514 U.S. 549 (1995) 6

Constitution and statutes:

U.S. Const.:
Art. I, § 8:
Cl. 1 (Spending Clause) 8, 9, 19
Cl. 3 (Commerce Clause) 15, 16, 19
Cl. 18 (Necessary and Proper Clause) 12, 19
Art. VI, Cl. 2 (Supremacy Clause) 18
Amend. X 17, 18, 20
5 U.S.C. 552(b)(7) 5
23 U.S.C. 130 ..... 9, 13
23 U.S.C. 133(d)(1) 13
23 U.S.C. 144 ..... 9, 13
23 U.S.C. 152 ..... 6, 7, 9, 10, 11, 13
23 U.S.C. 152(a)(1) 11
23 U.S.C. 152(a)(2) 11
23 U.S.C. 402 ..... 8, 9
23 U.S.C. 402(k)(1) 8, 9
23 U.S.C. 409 ..... *passim*

Miscellaneous:

H.R. Rep. No. 665, 99th Cong., 2d Sess. (1986) 10
U.S. Dep't of Transportation, Federal Highway Administration, *Supplementary Tables* (visited Sept. 25, 2002):
<http://www.fhwa.dot.gov///legsregs/directives/notices/n4510436/n4510436.htm> 14

Miscellaneous—Continued: Page

<http://www.fhwa.dot.gov///legsregs/directives/notices/n4510456/n4510456.htm> 14
<http://www.fhwa.dot.gov///legsregs/directives/notices/n4510479/n4510479.htm> 14

In the Supreme Court of the United States

No. 01-1229

PIERCE COUNTY, PETITIONER

v.

IGNACIO GUILLEN, LEGAL GUARDIAN OF JENNIFER GUILLEN AND ALMA GUILLEN, MINORS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF FOR THE UNITED STATES

A. The Scope of Section 409

1. *Purpose and Proper Construction of Section 409*

Section 409 of Title 23, U.S.C., bars the admission into evidence in state and federal court proceedings of reports, data, and information that are

> compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.

Section 409 further provides that such materials are not subject to discovery in judicial proceedings. As the con-

curring justices in the Washington Supreme Court explained, those statutory prohibitions are designed to ensure that States and local jurisdictions will not be deterred by concerns about liability and litigation from collecting and compiling information necessary to participate in the federal programs for highway safety improvement. "By preventing a litigant from gaining access to information that has been 'collected' for purposes of securing federal funding, Congress has made the litigant no better off than they would have been had the State not participated in the funding program." Pet. App. A127.

In light of that congressional purpose, Section 409 should be construed to bar discovery of information from a state or local agency that (a) generated the information for the purpose of obtaining approval to expend federal highway-safety funds, or (b) obtained the information from elsewhere (including another state or local agency) for that purpose. See Gov't Br. 28-36. Section 409 also applies to information that is originally collected for the purpose of obtaining such approval and is then transmitted to another agency, even when the information is sought from the transferee agency, and even if that agency uses the information solely for non-federal purposes. See *id.* at 32 n.24. Construed in that manner, Section 409 adequately ensures that the prospect of discovery and subsequent civil liability does not discourage state and local agencies from applying for federal highway-safety funds and from assimilating complete and accurate data in connection with their participation in federal highway safety programs.

2. *Respondents' Construction of Section 409*

Respondents concede that the interpretation of Section 409 set forth in the United States' opening brief is "reasonable, follows rules of statutory construction, and construes the Act in a functional manner." Resp. Br. 25.

Respondents nevertheless urge a narrower construction of Section 409. They argue (Resp. Br. 22-23, 25-26) that Section 409 applies only to reports and data that an agency *itself* has generated for the purpose of applying for federal highway-safety funding, and not documents that the agency obtains from elsewhere.[1] That proposed construction, however, is not faithful to the language of Section 409, which protects reports and data "compiled *or collected*" for specified federal purposes. Respondents' construction would essentially read the words "or collected" out of Section 409—a reading that is particularly flawed in light of Congress's addition of that phrase in 1995 to make clear that the prohibition covers materials that an agency applying for federal funds has obtained from elsewhere, even before those materials have been made part of a formal report, and to resolve a disagreement among the lower courts on that question. See Gov't Br. 5-6. Whether or not such documents are properly characterized as "compiled" for the specified federal purposes,[2] Congress's addition of the phrase "or collected" brings them within the scope of Section 409. That also is the only conclusion consistent with the bedrock principle of statutory construction that "[w]hen Congress acts to amend

---

[1] Respondents' construction of Section 409 would therefore produce the same practical result as the decision of the Washington Supreme Court, although by means of statutory construction rather than by the announcement of a rule of constitutional law.

[2] In an analogous context, this Court has construed the word "compiled" to reach documents that were assembled from other sources, as well as documents that were originally generated by the entity from which they are requested. See *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 153-154 (1989). The term "compiled," standing alone, may be ambiguous on that point. See *id.* at 161 (Scalia, J., dissenting). But Congress's decision to extend Section 409 to reach reports that were "collected" *as well as* "compiled" for specified federal purposes leaves no doubt that it intended to reach information obtained from other sources.

a statute, [the Court] presume[s] it intends its amendment to have real and substantial effect." *Stone* v. *INS*, 514 U.S. 386, 397 (1995).

The only reason respondents advance in support of their proposed alternative construction is that it would avoid the need to resolve any questions about the constitutionality of Section 409 in this particular case. See Resp. Br. 22-23, 25-26. As explained below (see pp. 14-15, *infra*), the United States' interpretation of Section 409 presents no constitutional difficulty, because it bars discovery and admission into evidence only of information that is integrally related to and was generated as part of the federal safety improvement programs. But in any event, a court's duty to construe statutes to avoid a difficult constitutional question "is qualified by the proposition that avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991) (internal quotation marks omitted); accord *Miller* v. *French*, 530 U.S. 327, 341 (2000). The canon of avoiding constitutional doubt cannot be stretched so far as to warrant excising language from the statute, which would be the result of respondents' submission. Moreover, even under respondents' construction of Section 409, that provision would *sometimes* have the effect of overriding state-law rules governing the admissibility of evidence in tort suits against state and local governmental bodies. That would appear sufficient to render the statute unconstitutional under the theories that respondent advances in this Court. See Resp. Br. 30-44. Acceptance of respondents' proposed narrowing construction therefore would not ultimately obviate the need for a judicial determination of Section 409's constitutionality.

Amicus Washington State Trial Lawyers Association Foundation (WSTLAF) argues (Br. 17) that Section 409 reaches only information that was "compiled or collected *solely* for the specified federal purposes." That submission is

not consistent with the plain language of Section 409. By its terms, Section 409 anticipates that information originally generated for a nonfederal purpose may become privileged if it is thereafter "collected" for the purpose of applying for federal highway-safety funds, insofar as that information is held by the agency involved in the federal application process. (The information will, however, remain nonprivileged as held by the entity that originally generated it for nonfederal purposes. See Gov't Br. 30-36; pp. 5-8, *infra*.) The protection conferred by Section 409 therefore extends beyond information that is compiled and collected *solely* for the specified federal purposes.

3. *Petitioner's Construction of Section 409*

Petitioner Pierce County, by contrast, argues (Br. 39-44) that when material is initially obtained by one state or local agency for routine state or local purposes unrelated to the federal highway safety improvement programs, and a copy of that material is subsequently furnished to a different state or local agency that uses it for the specified federal purposes, the coverage of Section 409 is extended to reach even the original copy of the material that remains in the custody of the first agency. Under that construction of Section 409, an accident report that is initially *not* privileged from discovery would *become* privileged merely because a copy was shared with others.[3] That result is not supported by the text,

[3] In advocating that construction of Section 409, amicus State of Louisiana relies (Br. 20-22) on *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146 (1989), in which this Court held that records prepared by one agency for non-law enforcement purposes, and subsequently transferred to another agency for use in law enforcement activities, were "compiled for law enforcement purposes" within the meaning of 5 U.S.C. 552(b)(7). In *John Doe Agency*, however, the plaintiff requested records in the possession of the *transferee* law enforcement agency, which had obtained custody over the *originals* of the records. See 493 U.S. at 149. The case did not involve a request for information from an agency that had

legislative history, or purposes of Section 409. Section 409 provides that reports "compiled or collected" for a specified federal "purpose" are not subject to discovery, thereby making the application of the privilege turn on the purpose of the particular collection or compilation that is being sought. In particular, Section 409 does not provide (as the County suggests) that an agency that originally "compiled" information for a nonfederal purpose is entitled to claim the benefit of that privilege merely because that information was subsequently "collected" for federal purposes *by someone else*. In the hands of the originating agency, the information remains compiled for a nonfederal purpose.[4]

---

transferred *copies* of records to another agency for the receiving agency's law enforcement purposes, while retaining the originals for its own, non-law enforcement-related functions.

[4] The County observes (Br. 40-41) that Congress intended to disapprove at least some decisions that had narrowly construed Section 409, to reach only reports actually generated by the agency that applied for federal highway-safety funding. But while Congress plainly wanted to extend the protection of Section 409 to information that *such agencies obtained* before they included that information in formal or bound reports submitted as part of the federal application process, the legislative history nowhere suggests that Congress also intended to reach backwards to extend a privilege to the original source of the information, when the information was not originally collected for Section 152 purposes and would have been nonprivileged in the hands of that source before it was transmitted to the agency applying for Section 152 funds. Congress sought to prevent tort plaintiffs from obtaining an advantage as a result of the state or local agency's *compilation* or *collection* of information under the federal program, cf. *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989), in order "to keep the record-keeping required by Federal funding provisions from providing an additional, virtually no-work, tool for direct use in private litigation." *Light* v. *State*, 560 N.Y.S.2d 962, 965 (Ct. Cl. 1990). It is not necessary, in order to accomplish that purpose, to extend the privilege to information that remains in the hands of the agency that originally obtained it solely for nonfederal (and therefore non-privileged) purposes.

Nor is the County's construction of Section 409 necessary to ensure that state and local agencies are not discouraged from applying for federal highway-safety funds. The County observes (Br. 42) that, because its Public Works Department receives accident reports from the state patrol, that department serves as a "central location for *all* accident history concerning its roads created by *all* law enforcement" agencies.[5] The County then suggests (Br. 43) that extending the protection of Section 409 to all governmental entities that hold the documents or information in question will encourage governments to participate in the federal application process.

Under the County's construction, Section 409 would preclude discovery and introduction into evidence of documents that state and local governments would have created and maintained even if federal highway-safety funding programs had never been enacted. The background to Section 409 does not suggest that Congress believed that state and local governments needed or were entitled to such an *extraordinary incentive* to apply for federal funds. Rather, Congress sought to ensure that the prospect of civil discovery

---

[5] If the County Public Works Department obtained that information to use in the Section 152 process, that department could claim the protection of Section 409. But the agencies from which it received those accident reports would not be entitled to that protection if those agencies collected and retained the information solely for nonfederal purposes. Those originating agencies might, however, be able to argue that state law provided them with another basis for resisting discovery of the accident reports—for example, by arguing that it would be unduly burdensome to require the agency to retrieve the reports in a manner useful to the tort plaintiff. See Gov't Br. 31 n.23. Moreover, if particular reports are originally prepared for nonfederal purposes, but are subsequently maintained or indexed in a particular manner (*e.g.*, by accident location) in order to facilitate the State's application for federal highway-safety funds, Section 409 would preclude the plaintiff from requiring the agency to utilize that indexing scheme in responding to a discovery request.

and/or subsequent liability did not operate as an artificial *dis*incentive to participation in the federal safety improvement programs or to the gathering and assembling of complete and accurate data in the course of that participation. The construction of Section 409 that the United States proposes fully achieves that congressional objective.

B. The Constitutionality of Section 409

1. *Spending Clause*

a. Respondents contend (Br. 4-9, 30-33) that Section 409 exceeds Congress's power under the Spending Clause because (respondents argue) Section 409 was not needed to promote transportation safety, and therefore was not a necessary or proper measure to "provide for the * * * general Welfare of the United States" (U.S. Const. Art. I, § 8, Cl. 1). That contention lacks merit. This Court has stressed that "courts should defer substantially to the judgment of Congress" in determining whether a law promotes the general welfare, *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987), and indeed has noted that "[t]he level of deference to the congressional decision is such that the Court has * * * questioned whether 'general welfare' is a judicially enforceable restriction at all," *id.* at 207 n.2.

Respondents' attack on the need for Section 409 has two prongs. First, respondents observe (Br. 4-6) that 23 U.S.C. 402 (which was enacted in 1966) separately requires the States to establish a highway safety program to reduce traffic-accident deaths and injuries, and to collect data on such deaths and injuries; that Section 402(k)(1) encourages the States to develop computerized safety recordkeeping systems to fulfill their Section 402 datakeeping obligations; and that reports, lists, or schedules prepared by or for States under Section 402(k)(1) are not admissible into evidence in any damages action. Respondents maintain that Section 409 is redundant because the objective for which it was

designed—the promotion of transportation safety by ensuring that States and local governments are candid, accurate, and thorough in evaluating safety hazards on their roads—would have been accomplished by Section 402 in any event.

Even if Section 409 and Section 402(k)(1) might sometimes overlap and cover the same information, it is difficult to see how a provision of federal law that is merely redundant in a particular application would have any incremental effect at all on state judicial proceedings, much less result in an independent intrusion on state prerogatives that could exceed Congress's powers under the Spending Clause. In any event, Congress evidently concluded that Section 409 would furnish additional protection and thereby further promote transportation safety, and there is no basis for second-guessing that determination. Section 409 applies broadly to information compiled or collected for the purpose of participating in safety programs under 23 U.S.C. 130, 144, and 152, "or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds." 23 U.S.C. 409. Section 409 expressly protects the information to which it applies from discovery in addition to use at trial, while Section 402(k)(1) does not. And Section 409 applies whether or not the information was prepared for or is derived from a computerized records system, and whether or not it is related to the receipt of a federal grant under Section 402(k)(1).

Second, respondents argue (Br. 6, 31) that Section 409 was not necessary to ensure that States would apply for federal hazard elimination funds because there is no evidence that any State has ever failed to apply for such assistance. Section 409, however, serves not only to remove a possible disincentive to the submission of funding applications, but also to promote federal interests by ensuring that States

(and their subdivisions), in participating in those programs, are thorough and candid in evaluating hazards within their jurisdictions. See H.R. Rep. No. 665, 99th Cong., 2d Sess. 56 (1986) (explaining that version of Section 409 contained in predecessor bill was intended "to encourage greater accuracy and completeness in the compilation of [covered materials], by preventing [the materials] from being used in any judicial proceeding, thereby improving their quality as a basis for programming."). Contrary to respondents' suggestion (Br. 31), Congress was not required to assemble an evidentiary record documenting the basis of that concern. As this Court has repeatedly recognized, "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner Broad. Sys.* v. *FCC*, 520 U.S. 180, 213 (1997). That principle has particular force in the present constitutional context, where the question is whether Congress has acted properly to promote the "general welfare"—an issue on which Congress's judgment is reviewable, if at all, under an extremely deferential standard. See p. 8, *supra*.

b. Respondents further argue (Br. 33-35) that Congress did not unambiguously place the States on notice that, as a consequence of applying for or accepting federal highway-safety funds, state courts must respect and apply the evidentiary privilege of Section 409. That submission is also without merit. It is true that Section 409 is not framed expressly as a condition that a State must meet before receiving federal funds or as a pledge that a State must undertake when it accepts such funds. Moreover, an entity (such as Pierce County) need not actually receive federal funds to ameliorate a particular hazardous condition in order to claim the benefit of Section 409 in later litigation involving that specific hazard: the protection afforded by that Section

would be available to the County even if its application for Section 152 funds for a particular project were unsuccessful.

Nonetheless, conditions on participation in a federal program need not take any one form, and here the evidentiary privilege required by Section 409 plainly is a condition on a State's participation in a federal funding program. The privilege is not free-standing and categorically mandated by Congress, but rather attaches only as a result of the State's voluntary decision to apply for federal financial assistance for highway-safety projects. The Washington legislature could choose to finance the elimination of hazardous road conditions within the State entirely through state funds. Cf. *New York* v. *United States*, 505 U.S. 144, 174 (1992) ("The State need not * * * participate in any federal program, if local residents do not view such * * * participation as worthwhile.").[6] If the State chooses to apply for federal highway-safety funds, however, subsequent discovery and evidentiary disputes regarding documents compiled or collected for that purpose will be governed by Section 409.

Respondents (Br. 34), joined by amici Lynn A. Baker & Mitchell N. Berman (Br. 12-14), also argue that Section 409 is not an unambiguous condition on participation in a federal

---

[6] Amici Whitmers argue (Br. 22-23) that Section 409 is not a condition attached to a State's voluntary participation in a federal funding program but rather part of a legal obligation to participate in that program, directly imposed on the States by Congress. Amici stress that 23 U.S.C. 152(a)(1) provides that the States "shall" collect and compile the data necessary to obtain funding under Section 152. Amici overlook the fact that 23 U.S.C. 152(a)(2) expressly provides that, in carrying out the Section 152 program, a State "may, at its discretion," identify hazardous conditions and develop projects to ameliorate those hazards. Thus, Section 152(a)(2) confirms that participation in the Section 152 program is left to a State's free choice. Nor has the Secretary of Transportation ever understood Section 152 "to be something other than a typical funding statute." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 22 (1981).

spending program because different constructions of that statutory privilege have been and could be put forward. Even respondents acknowledge (Br. 28-29), however, that Section 409 bars discovery and admission into evidence of at least *some* materials "collected or compiled" for federal purposes. The existence of judicial disagreement as to the exact scope of a provision that is unquestionably a condition on federal spending does not deprive a State of the requisite notice. Although interpretation of Section 409 is necessary to determine the precise extent of its coverage, Section 409 is unambiguous in establishing an evidentiary privilege as a consequence of participation in a federal funding program. Cf. *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 638-653 (1999); *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669-670 (1985). Section 409 does more than "express a congressional preference," *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 19 (1981): it establishes a federal rule that governs discovery and evidentiary disputes if, but only if, a State applies for specified forms of federal aid.

Moreover, whether or not Section 409 is regarded as a typical condition attached to a federal spending program, it may be upheld as an exercise of Congress's power under the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, to ensure that federal spending for highway-safety projects achieves its intended objectives and to further the "integrity and proper operation of the federal program." *Salinas* v. *United States*, 522 U.S. 52, 61 (1997). Amicus Association of Trial Lawyers of America (ATLA) argues (Br. 19-21) that Section 409 is not "necessary" to ensure the effectiveness of the underlying spending programs because (amicus suggests) a State that is concerned that information collected and compiled for federal purposes could be used against it (or its local governments) in litigation could create an evidentiary privilege for its own benefit as a matter of state law. Congress, however, is entitled to choose the measures

it deems necessary to ensure the efficacy of a *federal* safety program–including the efficacy of safety data and reports on which the federal government relies along with the States—even if a particular State might reach a different conclusion or might simply fail to enact appropriate safeguards.

c. Amicus ATLA also argues (Br. 15) that Section 409 is impermissibly coercive of the States because a State that declines to accept the Section 409 privilege must lose "100% of its share of highway funds." That contention lacks merit. Contrary to amicus's suggestion (*ibid.*), a State that is unwilling to accept the application of the Section 409 privilege in its courts need not "decline to participate in the highway-aid program altogether." According to the Department of Transportation, during the fiscal years 2000-2002, federal funds that are available only for the various safety-improvement programs to which the Section 409 privilege applies accounted, on a nationwide basis, for between 12%-13% of total federal highway assistance to the States. For the State of Washington, those funds accounted for between 18%-24% of total federal highway assistance.[7] Thus, even if a State

[7] Under 23 U.S.C. 133(d)(1), "10 percent of the funds apportioned to a State under [23 U.S.C.] 104(b)(3) for the surface transportation program [STP] for a fiscal year shall only be available for carrying out sections 130 and 152 of this title." The percentages in the text were computed by adding (for each fiscal year) 10% of the STP allotment (for the nation and for the State of Washington) to the amount of payments for the highway bridge replacement and rehabilitation program under 23 U.S.C. 144, and then comparing those combined amounts to the total highway funds available to the States collectively and to Washington State. For fiscal years 2000-2002, the sums reserved for Section 130 and 152 programs accounted for between 1.7%-1.9% of total federal highway assistance to the States, and between 1.9%-2.0% of federal highway assistance to the State of Washington. For the same fiscal years, federal payments under the Section 144 bridge program accounted for between 10%-12% of total federal highway assistance to the States, and between 16%-22% of federal

declined to participate in any federal program to which Section 409 would apply, it would remain eligible to receive the large majority of federal highway funds available to it.

In any event, even assuming that States will perceive a strong practical incentive to participate in the federal funding programs referenced in Section 409, any intrusion on state prerogatives that the protection afforded by Section 409 might entail is minimal in light of the distinctively "federal" character of the documents to which Section 409 applies. The limited nature of that intrusion results not simply from the fact that application of Section 409 is contingent on a State's voluntary decision to participate in federal highway-safety funding programs, and thereby to generate reports and data to which the protection of Section 409 attaches. In addition, the class of documents to which Section 409 applies is limited by its terms to records having a direct connection to the underlying federal programs—*i.e.*, to information "compiled or collected for the purpose of" identifying, evaluating, or planning safety enhancement projects to be undertaken using federal financial assistance.

In that respect, the Section 409 privilege is considerably less intrusive than was the condition on federal highway funding—namely, that the State adopt a drinking age of 21—that was upheld by this Court in *South Dakota* v. *Dole*. The Court found that condition to be "directly related to one of the main purposes for which highway funds are expended —safe interstate travel," 483 U.S. at 208, based on evidence that "[t]his goal of the interstate highway system had been frustrated by varying drinking ages among the States

highway assistance to the State of Washington. The underlying figures are *available in* http://www.fhwa.dot.gov///legsregs/directives/notices/n4510479/n4510479.htm (Table 1) (fiscal year 2002); http://www.fhwa.dot.gov///legsregs/directives/notices/n4510456 /n4510456. htm (Table 1) (fiscal year 2001); and http://www.fhwa.dot.gov///legsregs/directives/notices/n4510436 /n4510436.htm (Table 1) (fiscal year 2000).

[because] * * * the lack of uniformity in the States' drinking ages created an incentive to drink and drive," *id.* at 209 (internal quotation marks omitted). The Court found that nexus to be constitutionally sufficient, notwithstanding the dissenting Justice's undisputed observation that the spending condition was "over-inclusive because it stops teenagers from drinking even when they are not about to drive on interstate highways." *Id.* at 214-215 (O'Connor, J., dissenting). The condition established by Section 409, by contrast, is more narrowly tailored to the underlying spending program, since it applies *only* to documents compiled or collected for specified purposes under the federal program itself.[8]

2. *Commerce Clause*

Respondents contend (Br. 38-44) that Section 409 exceeds Congress's power under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. Respondents assert that Section 409 "regulate[s] state court proceedings" (Br. 40) and that because "state judicial proceedings are neither economic nor commercial activities" (Br. 43), Congress is powerless under

[8] Even if no federal highway funds had been available, the State of South Dakota would have established and enforced *some* drinking age. The effect of the spending condition at issue in *South Dakota* v. *Dole* was that the State could receive its full allotment of federal highway funds only by amending its existing law, which permitted the sale to 19-year-olds of beer containing up to 3.2% alcohol. See 483 U.S. at 205. Such a change would have affected the state-law rights of 19- and 20-year-olds within South Dakota even when those persons were not driving on federally-funded interstate highways. Absent the federal highway-safety funding programs referenced in Section 409, however, there would *be* no records "compiled or collected for the purpose of" participating in such programs. Section 409 therefore cannot properly be viewed as inducing the State to adopt a meaningful change in any pre-existing or independent policy regarding the discoverability or admissibility of the particular documents to which the privilege applies.

the Commerce Clause to enact a rule of decision applicable in such proceedings. That argument lacks merit.

Section 409 serves to facilitate efforts by States and localities to evaluate and rectify hazardous highway conditions. Amelioration of such hazards indisputably serves to reduce barriers to interstate commerce. Section 409 is thus an exercise of Congress's established power to protect both the "channels of interstate commerce" and the "instrumentalities of interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 558 (1995); see Gov't Br. 40-42.

The fact that Section 409 achieves its objectives indirectly (by regulating one aspect of litigation in state or federal court and thereby removing a possible disincentive to the States' ameliorative efforts) does not render it an invalid exercise of Commerce Clause authority. It is well-settled, for example, that Congress's power to regulate interstate commerce includes the power to preempt state-law causes of action altogether if Congress concludes that such lawsuits would disserve federal regulatory objectives. See Gov't Br. 41 n.31. Here, Congress has taken the far more modest step of protecting certain information directly related to the federal program from discovery or admission into evidence in such a lawsuit. Like the evidentiary rule established by Section 409, federal statutory provisions that (expressly or impliedly) preempt state law that confers a cause of action in court might in some sense be characterized as regulating state-court proceedings. But so long as Section 409 constitutes a reasonable means of enhancing the safety of the Nation's transportation system, it falls within the scope of Congress's authority under the Commerce Clause.

3. *Tenth Amendment*

Respondents assert in passing, and only in the Conclusion section of their brief (Br. 44-47), that Section 409 impermissibly interferes with the governmental structures of the

States in violation of the Tenth Amendment. Because that argument is otherwise undeveloped, it is not properly before the Court. Cf. *Salinas* v. *United States*, 522 U.S. 52, 61 (1997) (declining to address point on which litigant had failed to raise "any cognizable challenge" in Supreme Court). Although some of respondents' amici do develop a Tenth Amendment argument, this Court ordinarily does not entertain contentions that are raised only by amici, especially (as here) constitutional challenges of potentially sweeping import that were not addressed by the courts below. See *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992).[9]

In any event, any Tenth Amendment challenge to Section 409 would be without merit. If Section 409 as applied to state-court litigation is a valid exercise of Congress's spending power (see pp. 8-15, *supra*), it cannot be separately assailed under the Tenth Amendment. This Court has made clear that the Tenth Amendment does not independently limit Congress's power to establish conditions attendant to voluntary participation by the States in federal spending programs. See *New York* v. *United States*, 505 U.S. at 173-174, 188; *South Dakota* v. *Dole*, 483 U.S. at 209-211; *Okla-*

---

[9] Respondents also assert in passing in their Summary of Argument (Br. 17-18) that they have standing to challenge Section 409 on Tenth Amendment as well as other constitutional grounds, but they do not develop that specific standing point in the body of their brief. The question whether respondents have standing to challenge Section 409 under the Tenth Amendment may have a different answer from the question whether respondents have standing to challenge Section 409 as exceeding Congress's enumerated powers. See Gov't Br. 23-27. Because the question whether respondents have standing to assert a Tenth Amendment challenge has potentially significant implications, the Court should decline to address it and other Tenth Amendment issues in light of respondents' failure to preserve a Tenth Amendment challenge in this Court.

homa v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947). If the State of Washington deems it to be an acceptable consequence of obtaining federal highway-safety funds that Section 409 should operate in its courts, the Tenth Amendment does not prevent the State from agreeing to that result.[10]

Amicus ATLA argues (Br. 9-11, 22-25) that Section 409 violates the Tenth Amendment because Congress has no authority to regulate state tort law. Section 409, however, neither requires a state legislature to enact any rule of law, as in *New York* v. *United States*, 505 U.S. 144 (1992), nor commandeers state executive officials to enforce federal law, as in *Printz* v. *United States*, 521 U.S. 898 (1997). See *Reno* v. *Condon*, 528 U.S. 141, 149-151 (2000). Rather, Section 409 provides only that, if a State chooses to participate in federal highway-safety funding programs, the courts of that State (along with federal courts) must apply a federal rule of privilege to a defined class of discovery and evidentiary disputes involving documents generated under those programs. That result follows from a straightforward application of the Supremacy Clause and raises no Tenth Amendment concern. See also *Printz*, 521 U.S. at 907.

---

[10] Amicus ATLA argues (Br. 28-30) that Section 409 violates the Tenth Amendment because it interferes with the States' sovereign right to assign responsibility for evidentiary rules to the courts rather than to the state legislature or executive. Any such "interference," however, is caused solely by the state government's voluntary decision to apply for federal funds. Neither that choice nor the Section 409 privilege is imposed unilaterally by the federal government. Respondents presumably remain free to argue to the Washington courts that, as a matter of state constitutional law, the state legislature and executive branch may not agree to the operation of an evidentiary privilege that the state judiciary has not devised. At most, however, such an argument could establish that Washington is disabled by state constitutional law from applying for federal highway-safety funds, with their attendant conditions; it would not establish that Section 409 violates the United States Constitution.

Congress has undoubted authority under the Spending Clause, Commerce Clause, and Necessary and Proper Clause to require state and federal courts to apply substantive outcome-determinative federal law, and to preempt conflicting state law. See p. 16, *supra*. Since state participation in federal highway-safety funding programs is voluntary, the application of the evidentiary rule in Section 409 as a consequence of that participation is less disruptive of state prerogatives than is routine federal preemption of state law. Congress could constitutionally have provided, as a matter of substantive federal law, that no state or local government could be held liable in damages for failing to ameliorate any hazardous road condition for which that governmental entity had sought federal funds, and it could have preempted the application of any state law that would impose such liability. In Section 409, Congress has taken the lesser, but equally substantive, step of precluding certain evidence from being subject to discovery or admitted into evidence in litigation, *if* the State chooses to apply for specified forms of federal financial assistance.

ATLA also argues (Br. 26) that Congress has no authority to prescribe procedural rules applicable in state courts. This Court has acknowledged the "general and unassailable proposition * * * that States may establish the rules of procedure governing litigation in their own courts." *Felder* v. *Casey*, 487 U.S. 131, 138 (1988). The Court has also stressed, however, that state procedural rules are not exempt from preemption under federal law if Congress determines that a particular procedural rule interferes with legitimate federal objectives. See *id.* at 138-139; *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363-364 (1952) (state-court plaintiff in suit under Federal Employers Liability Act had federal right to jury trial, even though state law would have required bench trial). Moreover, a rule establishing a privilege over records compiled or collected

for a federal program is properly understood as substantive, and in any event poses no Tenth Amendment problems. Nothing in the Tenth Amendment prohibits Congress from protecting a federal interest in confidentiality—for example, in state secrets learned by federal employees—by making that information privileged in state as well as federal courts. And the fact that the State can avoid the privilege entirely by opting out of the federal funding programs for safety projects independently avoids any Tenth Amendment problem.

* * * * *

For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the Supreme Court of Washington should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

KIRK K. VAN TINE
General Counsel
Department of
Transportation

SEPTEMBER 2002

(3)

No. 01-1229

Supreme Court, U.S.
FILED
MAR 22 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, AS LEGAL GUARDIAN FOR JENNIFER GUILLEN AND ALMA GUILLEN, MINORS; AND MARIANO GUILLEN, AS LEGAL GUARDIAN FOR PAULINA GUILLEN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

AMICUS BRIEF OF THE STATE OF LOUISIANA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

RICHARD P. IEYOUB
Attorney General
JOHN C. YOUNG*
JAMES R. DAWSON
Assistant Attorneys General
626 N. 4th Street, Fifth Floor
Baton Rouge, Louisiana 70804-9095
(225) 342-8717

and

LAWRENCE A. DURANT
General Counsel, State of Louisiana, Department of Transportation and Development
P. O. Box 94245
1201 Capitol Access Road
Baton Rouge, LA 70804-9245
(225) 379-1207

**Counsel of Record for Amicus Curiae*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

1. The determination by the Washington State Supreme Court that there is no valid federal interest in Congress preempting state court discovery and evidentiary rules, and that § 409 is therefore unconstitutional, is in conflict with the decisions of the supreme courts of other states and of a federal district court 4

2. Congress has the constitutional right to create national highway safety improvement programs and to condition the voluntary participation in those programs on the acceptance of the terms of a contractual agreement that are in furtherance of a relevant and valid interest reasonably related to a specific worthwhile national program 9

3. The federal statute (§ 409) is but one of several federal statutes that impose exact or similar discovery and evidentiary restrictions in suits in tort, and if the decision of the Washington Supreme Court is allowed to stand, the validity of those statutes would become at issue, attacking the legitimacy of Congress to determine terms to effectuate the implementation of its programs 14

TABLE OF CONTENTS – Continued

Page

4. The interpretation of this statute is an important federal question that has not been previously addressed by this Honorable Court and is necessary for the continued proper application of the various federal highway safety improvement programs 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Baldrige v. Shapiro, 455 U.S. 345 (1982) 14

Claspill v. Missouri Pacific R. Co., 793 S.W.2d 139 (Mo. 1990), *cert. denied*, 498 U.S. 984 (1990) 5

Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir.(Ga.) Aug. 21, 1997), *reversed on other grounds, Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)..... 10

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 5

Gaubert v. Denton, 1999 WL 350103 (E.D.La. May 28, 1999), *affirmed by*, 210 F.3d 368 (5th Cir.(La.) Feb. 17, 2000) 7, 8, 16

Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) 10

Guillen v. Pierce County, 31 P.3d 628 (Wash. Sep. 13, 2001)..... 11

Martinolich v. Southern Pacific Transp. Co., 532 So.2d 435 (La.App. 1 Cir. 1988), *writ denied*, 535 So.2d 745 (La. 1989), *cert. denied, Louisiana Dept. of Transp. and Development v. Nick Martinolich, Inc.*, 490 U.S. 1109 (1989) 6, 10

New York v. United States, 505 U.S. 144 (1992) 10, 13

Palacios v. Louisiana and Delta R.R., Inc., 2000-00971 (La.App. 3 Cir. 12/29/00), 775 So.2d 698, *writ denied*, 2001-0565 (La. 5/4/01), 791 So.2d 653..... 7

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 10

TABLE OF AUTHORITIES – Continued

Page

People of State of Cal. ex rel. Dept. of Transp. v. U.S., 27 Fed.Cl. 130 (Fed.Cl. Oct. 30, 1992) 11

Printz v. United States, 521 U.S. 898 (1997)..... 13

Reichert v. State, Dept. of Transp. and Development, 96-1419 (La. 5/20/97), 694 So.2d 193..... 6

Reno v. Condon, 528 U.S. 141 (2000) 13

Robertson v. Union Pacific R. Co., 954 F.2d 1433 (8th Cir. 1992) 9

Sawyer v. Illinois Cent. Gulf R. Co., 606 So.2d 1069 (Miss. 1992) 5, 6

Seaton v. Johnson, 898 S.W.2d 232 (Tenn.Ct.App. Jan. 27, 1995), *appeal denied*, (May 01, 1995) 8

South Carolina v. Baker, 485 U.S. 505 (1988)..... 5

South Dakota v. Dole, 483 U.S. 203 (1987) 10

St. Regis Paper Co. v. U.S., 368 U.S. 208 (1961)..... 16

Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118 (1939)..... 8

Wiedeman v. Dixie Elec. Membership Corp., 627 So.2d 170 (La. Nov. 29, 1993), *cert. denied, Louisiana Dept. of Transp. and Development v. Wiedeman*, 511 U.S. 1127 (1994) 6

STATUTES AND REGULATIONS

U.S. Const. art. I, § 8, cl. 1 9

U.S. Const., art. I, § 8, cl. 3..... 5

U.S. Const. art. VI, cl. 2 6

10 U.S.C. § 1102(b) 14

TABLE OF AUTHORITIES – Continued

Page

13 U.S.C. § 9(a) 14, 15

14 U.S.C. § 645(b) 14

15 U.S.C. § 2055..... 14

20 U.S.C. § 9007(b)(1)..... 14

21 U.S.C. § 360i(b)(3) 14

23 U.S.C. § 133..... 12

23 U.S.C. § 152.....11, 12

23 U.S.C. § 402..... 15

23 U.S.C. § 402(k)(1)..... 15

23 U.S.C. § 409..... *passim*

33 U.S.C. § 930(c) 14

49 U.S.C. § 504(f)..... 14

49 U.S.C. § 1154(a)(5)(b) 14

49 U.S.C. § 20703(c) 14

49 U.S.C. § 20903..... 14

49 U.S.C. § 47507..... 14

23 C.F.R. § 1.1..... 11

23 C.F.R. § 1.9..... 11

23 C.F.R. § 924.9..... 12

23 C.F.R. § 924.13..... 12

INTEREST OF *AMICUS CURIAE*

This amicus brief is filed on behalf of the State of Louisiana and submitted by its Attorney General, Richard P. Ieyoub. Under Rule 37(4) consent of the parties and leave of this Honorable Court for this filing is not required.

The Supreme Court of the State of Washington has declared a federal statute (23 U.S.C. § 409) unconstitutional. This statute is a procedural rule that provides that records and reports that have been collected and compiled as part of the voluntary participation in federal highway safety improvement programs cannot be either discovered or ultimately used in any manner in any suit for damages.

In pursuit of a lawsuit for damages, the plaintiffs had sought in pre-trial discovery materials and data relating to the accident history for the intersection where their accident occurred. Pierce County interposed § 409 in opposition to the release of the requested accident history and associated data within the context of this tort action.

On an eventual appeal, the Washington State Supreme Court ordered the production, holding that § 409 was unconstitutional.

This brief is submitted in support of the petitioner, Pierce County, and the State of Louisiana asks that this Honorable Court grant the writ application and reverse the decision of the Washington State Supreme Court.

Louisiana, like the State of Washington, receives substantial sums under these various federal highway safety improvement programs. To participate in these voluntary

programs, it collects, compiles, and utilizes a significant amount of information, including the types of data and records sought to be discovered by the plaintiffs in this case.

To facilitate candid evaluation and highway safety improvement planning, Congress implemented § 409, creating a discovery and evidentiary bar in tort litigation and thereby choosing to preempt state and federal discovery and evidentiary rules to the contrary that would otherwise allow either the discovery of the material sought by the plaintiffs in this case or its use for any purpose in a suit for damages.

Louisiana is one of the few states whose courts have addressed the constitutionality of this federal statute. Its courts have found the statute to be a permissible preemption of its state discovery and evidentiary rules as Congress has a relevant and valid interest reasonably related to a specific worthwhile national program.

Louisiana recognizes that this preemption is in the exercise of the worthy goal of Congress to improve the safety of this nation's highways.

SUMMARY OF THE ARGUMENT

In the Petition for Writ of Certiorari filed by Pierce County and in the Amicus Curiae Brief filed by the Attorney General of the State of Washington in support of Pierce County's application, valid reasons are presented why this Honorable Court should review the decision of the Washington State Supreme Court.

The State of Louisiana suggests that there are other equally valid reasons why this Honorable Court should grant the writ request and reverse the decision of the Washington State Supreme Court that allowed the discovery of various records and reports that had been collected and compiled as part of a voluntary participation in federal highway safety improvement programs.

First, one of the major considerations for the granting of a writ of certiorari is present as the determination by the Washington State Supreme Court that there is no valid federal interest in Congress preempting state court discovery and evidentiary rules, and that § 409 is therefore unconstitutional, is in conflict with the decisions of the supreme courts of other states and of a federal district court for Louisiana.

The decision of the Washington State Supreme Court also questions whether Congress has the constitutional right to create national highway safety improvement programs and to then condition the voluntary participation in those programs on the acceptance of terms that might conflict with state procedural and evidentiary rules but which terms are in furtherance of a relevant and valid interest reasonably related to a specific worthwhile national program, i.e., the safety improvement of the highways of this nation.

As an additional reason for the grant of this writ request, § 409 is but one of several federal statutes that impose exact or similar discovery and evidentiary restrictions in suits in tort. If the decision of the Washington State Supreme Court is allowed to stand, the validity of

those statutes would become at issue, attacking the legitimacy of Congress to determine terms and inducements to effectuate the implementation of its programs.

Further, the interpretation of this statute is an important federa question that has not been previously addressed by this Honorable Court and is necessary for the continued proper application of the various federal highway safety improvement programs. The failure to grant this writ request and to thus allow the erroneous decision of the Washington State Supreme Court allowing this discovery to become cloaked with apparent authority will seriously impact those highway safety programs.

ARGUMENT

1. **The determination by the Washington State Supreme Court that there is no valid federal interest in Congress preempting state court discovery and evidentiary rules, and that § 409 is therefore unconstitutional, is in conflict with the decisions of the supreme courts of other states and of a federal district court**

Rule 10 of this Honorable Court sets forth considerations for the review on a writ of certiorari.

One significant consideration is where a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort.

By determining that there is no relevant and valid federal interest reasonably related to a specific worthwhile national program, the Washington State Supreme Court reached a decision in direct conflict with contrary determinations by three other state supreme courts.

In *Claspill v. Missouri Pacific R. Co.*, 793 S.W.2d 139, 141 (Mo. 1990), *cert. denied*, 498 U.S. 984 (1990), the Missouri State Supreme Court held that in creating § 409 Congress was acting in constitutional concert with the Commerce Clause (U.S. Const., art. I, § 8, cl. 3). Citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985) and *South Carolina v. Baker*, 485 U.S. 505 (1988), the Missouri court noted that the state courts were not to create "judicially defined spheres of unregulable state activity." To give § 409 effect was, therefore, not in contravention of the Tenth Amendment of the United States Constitution.

A similar constitutional challenge was rejected by the Mississippi State Supreme Court in *Sawyer v. Illinois Cent. Gulf R. Co.*, 606 So.2d 1069 (Miss. 1992). In finding no basis for a constitutional rejection of § 409, that court noted:

> "[N]obody made Mississippi get into the railroad crossing safety enhancement program. It is a voluntary program. Duly authorized officials of this state, however, have committed us to the program – in exchange for ninety percent federal funding – and it does not strike us outrageous that we should accede to the federal government's rules and regulations appertaining thereto. We have it on good authority that Missouri and Louisiana have rejected challenges to Section 409. See *Claspill v. Missouri Pacific*

Railroad Co., 793 S.W.2d 139 (Mo. 1990); *Martinolich v. Southern Pacific Transportation Co.*, 532 So.2d 435 (La. Ct.App. 1988). We accept Section 409 as controlling, as well." *at* 1074.

As indicated in *Sawyer, supra*, Louisiana courts have also addressed whether the application of § 409 would be unconstitutional.

In *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So.2d 170 (La. Nov. 29, 1993), *cert. denied, Louisiana Dept. of Transp. and Development v. Wiedeman*, 511 U.S. 1127 (1994), the Louisiana State Supreme Court noted, that despite the State's substantial interest in the application of its discovery and evidentiary rules:

> "§ 409's explicit preemptive language overrides conflicting state law by virtue of the Supremacy Clause. U.S. Const. art. VI, cl. 2; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, 613 (1977). Section 409 controls. *Beecher v. Keel*, 607 So.2d 549 (La.1992). See also *Claspill v. Missouri Pacific Railroad Company*, 793 S.W.2d 139, 140 (Mo. banc 1990)." *at* 172.

In *Reichert v. State, Dept. of Transp. and Development*, 96-1419, p. 7 (La. 5/20/97), 694 So.2d 193, 199, the Louisiana State Supreme Court again noted that "the extent to which certain documents are discoverable or admissible is clearly a procedural right." However, the plaintiff was "not deprived of a constitutionally vested right when deprived of the evaluations and recommendations of the DOTD."

Additionally, a Louisiana State Court of Appeal decision, *Martinolich v. Southern Pacific Transp. Co.*, 532 So.2d

435 (La.App. 1 Cir. 1988), *writ denied*, 535 So.2d 745 (La. 1989), *cert. denied, Louisiana Dept. of Transp. and Development v. Nick Martinolich, Inc.*, 490 U.S. 1109 (1989), has been frequently cited by the courts of other states as authority for the holding that the limitation on the admission of certain items under § 409 may be intrusive, but:

> "[T]he intrusion, in this instance, however, is constitutionally permissible because Louisiana's participation in the federal funding scheme is voluntary; because the improvement of state highways with federal funds is in pursuit of '[providing] for the general welfare' as provided in U.S.Const. Art. I, § 8, cl. 1 ('spending power'); because it is clear that participation in the funding program requires acquiescence to the intrusion; and, finally, because the intrusion is related to a valid federal interest (inasmuch as 23 U.S.C. § 409 encourages participation in a scheme that ensures, by prioritization, deliberative spending of federal funds). *South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 2796, 97 L.Ed.2d 171 (1987)." *at* 438.

More recently, another Louisiana state appellate court, *Palacios v. Louisiana and Delta R.R., Inc.*, 2000-00971 (La.App. 3 Cir. 12/29/00), 775 So.2d 698, *writ denied*, 2001-0565 (La. 5/4/01), 791 So.2d 653, held that § 409 was constitutional under the Supremacy Clause, citing *Martinolich, supra*.

That court further noted that a federal court for Louisiana, *Gaubert v. Denton*, 1999 WL 350103 (E.D.La. May 28, 1999), *affirmed by*, 210 F.3d 368 (5th Cir. (La.) Feb. 17, 2000), had also found that § 409 violated neither

procedural due process nor the right of access to the courts.

In *Gaubert, supra,* the federal district court commented that "every court that has considered the privilege, both federal and state, has concluded that it serves the legitimate purpose of fostering the collection and evaluation of highway safety information free from the threat of future tort actions" and rejected the challenges to § 409 under the First, Fifth, Tenth, and Fourteenth Amendments to the United States Constitution.

The federal district court in *Gaubert, supra,* in applying the holding of *Tennessee Electric Power Co. v. Tennessee Valley Authority,* 306 U.S. 118 (1939), to the facts at hand, found that the plaintiff lacked standing to bring his Tenth Amendment challenge.

It is noted that in this case the Washington State Supreme Court also held, that as to the requested accident history and associated data, prohibiting discovery under § 409 was in constitutional contravention to that state's Public Disclosure Act.

While no other state supreme court appears to have addressed the issue as to whether a state's public records act could be used to circumvent § 409 within the framework of a suit for damages, a Tennessee state appellate court rejected a Tenth Amendment challenge to the supremacy of § 409 and found that § 409 did constitutionally bar the discovery of a location's accident history despite that state's Public Records Act. See *Seaton v. Johnson,* 898 S.W.2d 232, 236 (Tenn.Ct.App. Jan. 27, 1995), *appeal denied,* (May 01, 1995): "It would be an anomaly for this Court to deny access to the State's copy of its report

to the federal government only to require the State to compile from its records a report to plaintiff identical with that furnished to the federal government."

Nothing in § 409 takes public information about accidents and converts it to private, secret information. The analysis can be, and often is, publicized widely. However, this analysis, and the material gathered to formulate that analysis, just cannot then be subject to discovery within the context of this suit for damages *or* otherwise used in a courtroom to obtain a money judgment for damages, whether against a state, municipal government, or private entity. See, i.e., *Robertson v. Union Pacific R. Co.,* 954 F.2d 1433 (8th Cir. 1992), excluding from evidence under § 409 a newspaper article reporting the highway department's analysis and ranking of a railroad crossing.

As such, the decision of the Washington State Supreme Court is in direct conflict with the decisions of the supreme courts of other states, reasoned decisions of lower state courts, and a federal district court. That justifies the granting of writs in this case.

2. Congress has the constitutional right to create national highway safety improvement programs and to condition the voluntary participation in those programs on the acceptance of the terms of a contractual agreement that are in furtherance of a relevant and valid interest reasonably related to a specific worthwhile national program

This Honorable Court has long recognized, that pursuant to Congress' power to legislate under the Spending Clause (U.S. Const. Art. I, § 8, cl. 1), Congress may fix the

terms on which it may disburse federal money to the states. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

Legislation enacted pursuant to the spending power is in the nature of a contract. *Pennhurst, supra* at 17. In return for federal funds, the states agree to comply with the conditions that Congress has attached to its offer. *Pennhurst, supra* at 17; *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

A prospective recipient state is free to decline a grant of federal funding. *New York v. United States*, 505 U.S. 144, 168 (1992). Also see *Martinolich, supra* at 438: "Louisiana's participation in the federal funding scheme is voluntary."

Similarly, a current recipient may withdraw from a federal program and decline further funding if it so chooses. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1399, (11th Cir.(Ga.) Aug. 21, 1997), *reversed on other grounds, Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), citing *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 596 (1983).

The freedom of recipients to decline a grant of federal funding ensures that they will remain responsive to the preferences of their local constituents. *New York v. U.S., supra* at 168.

Valid conditions imposed with federal funding bear a relationship to the purpose of the federal spending. *New York v. U.S., supra* at 168, citing *South Dakota v. Dole, supra* at 207-208.

While any number of federal highway safety programs are available to the states and to local governments, the one most applicable in the instant case is the Hazard Elimination Program (23 U.S.C. § 152).[1]

The Code of Federal Regulations implementing § 152 and other federal highway safety programs require that the states comply with those conditions to receive federal-aid funds. 23 C.F.R. §§ 1.1, 1.9; *People of State of Cal. ex rel. Dept. of Transp. v. U.S.*, 27 Fed.Cl. 130 (Fed.Cl. Oct. 30, 1992): "This regulation, in mandatory terms, prohibits federal fund participation in any cost incurred in violation of federal or state law, the regulations set forth in the C.F.R., or as prescribed by policies and procedures of the Administrator of FHWA."

One condition imposed in order to secure the federal funds is that the states report to the Secretary of Transportation on a yearly basis the progress being made to implement safety improvement projects for hazard elimination and the effectiveness of those improvements. Each state report *shall* contain, among other things, "the *previous* and subsequent *accident experience* at these locations." (§ 152(g)). This report *shall* also contain "the *previous* and subsequent *accident experience* at improved locations." (§ 152(g)).

---

[1] Pierce County had identified this intersection as especially hazardous and applied for federal hazard elimination funds under § 152. That application was denied. The County then reapplied on April 3, 1996, and on July 26, 1996, three weeks after this fatal accident, the application was granted. See, decision of Washington State Supreme Court, *Guillen v. Pierce County*, 31 P.3d 628, 633 (Wash. Sep. 13, 2001).

In addition to the reporting requirements, analysis of locations for planning potential improvement and evaluating those proposed measures require that the states collect and compile accident histories at those locations.[2]

This obligation to conduct and systematically maintain an engineering survey is for *all* public roads, not just those that may be part of a state highway system (§ 152(a)(1)), as funds authorized to carry out the hazard elimination program are available for expenditure on *any* public road (§ 152(c)(1)).[3]

---

[2] See, i.e., 23 CFR § 924.9 Planning (Highway Safety Improvement Program).

> "(a) The planning component of the highway safety improvement program shall incorporate:
>
> "(2) A process for analyzing available data to identify highway locations, sections and elements determined to be hazardous on the basis of *accident experience* or accident potential."

See, also, 23 CFR § 924.13 Evaluation (Highway Safety Improvement Program)

> "(a) The evaluation component of the highway safety improvement program in each State shall include a process for determining the effect that highway safety improvement projects have in reducing the number and severity of accidents and potential accidents, including:
>
> "(2) *A record of accident experience before* and after the implementation of a highway safety improvement project."

[3] In addition to the local projects authorized under § 152, numerous highway safety improvement programs also address the additional ability of local governments to apply for federal funding of local projects for hazard elimination on their roads and bridges, see, i.e., 23 U.S.C. § 133 (Surface Transportation Program). These additional hazard elimination projects, and the availability of federal funding, are also conditioned on the analysis of justifying data to affect a proper prioritization in the expenditure of both federal and local funds and are often under the administration of the states.

The trade-off for these requirements that such accident experience be compiled, collected, and utilized to plan and evaluate safety improvements and then that those evaluations be systematically reported to the Secretary of Transportation is the protection afforded by § 409 that the enforced compilation and collection of such data not then be subject to either discovery (as at issue in this case) or otherwise used in a tort action (which is, of course, the ultimate result of the Washington State Supreme Court's decision).

It is submitted that a possible way to view the requirements of Congress in § 409 is to view it the way this Honorable Court did in upholding the constitutionality of the Driver's Privacy Protection Act in *Reno v. Condon*, 528 U.S. 141, (2000):

> "Like the statute at issue in *Baker*, the DPPA does not require the States in their sovereign capacity to regulate their own citizens. *The DPPA regulates the States as the owners of data bases.* It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*."[4] *at* 151 (*emphasis supplied*)

---

[4] *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997).

3. The federal statute (§ 409) is but one of several federal statutes that impose exact or similar discovery and evidentiary restrictions in suits in tort, and if the decision of the Washington State Supreme Court is allowed to stand, the validity of those statutes would become at issue, attacking the legitimacy of Congress to determine terms to effectuate the implementation of its programs

The provision of § 409 that the "reports, surveys, schedules, lists, or data compiled or collected" pursuant to a highway safety improvement program "shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages" is not unique. Several other federal statutes or regulations contain similar restrictions on either the discovery or evidentiary use of such material or reports compiled or collected pursuant to federal requirements.[5]

This Honorable Court has held such a restrictive statute to be constitutional. See *Baldrige v. Shapiro*, 455

---

[5] See, i.e., 13 U.S.C. § 9(a) (census reports); 10 U.S.C. § 1102(b) and 14 U.S.C. § 645(b) (medical quality assurance records created by or for the Department of Defense); 21 U.S.C. § 360i(b)(3) (medical device user facility reports); 15 U.S.C. § 2055 (consumer product safety reports); 20 USCA § 9007(b)(1) (national educational statistical reports); 33 U.S.C. § 930(c) (injury reports for longshore and harbor workers' compensation); 49 U.S.C. § 504(f) (motor carrier accident reports); 49 U.S.C. § 1154(a)(5)(b) (discovery and use of cockpit and surface vehicle recordings and transcripts); 49 U.S.C. § 20703(c) (locomotive accident reports); 49 U.S.C. § 20903 (railroad carrier accident and incident reports); and 49 U.S.C. § 47507 (nonadmissibility of noise exposure map and related information as evidence).

U.S. 345 (1982), upholding 13 U.S.C. § 9(a) which provides: "Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding."

Of specific import is a similar discovery and evidentiary restriction established by 23 U.S.C. § 402, the implementing statute for Congress' highway safety programs. This statute requires that each state "*shall* have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths."

Further, § 402 provides that state programs:

> " . . . *shall* include, but not be limited to, provisions for an *effective record system of accidents* (including injuries and deaths resulting therefrom), *accident investigations* to determine the probable causes of accidents, injuries, and deaths, . . . highway design and maintenance (including lighting, markings, and surface treatment), traffic control, . . . surveillance of traffic for detection and correction of high or potentially high accident locations . . . " (*emphasis supplied*)

Again, as part of the trade-off for being required to collect and compile such information as part of the federal program to improve highway safety, a provision restricting the discovery and use of that information identical to § 409 is provided by § 402(k)(1):

> "Notwithstanding any other provision of law, if a report, list, schedule, or survey is *prepared by*

> *or for a State or political subdivision thereof* under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey." (*emphasis supplied*)

This statute has not been the subject of much litigation but was found to be constitutional by the federal Eastern District of Louisiana court in *Gaubert v. Denton, supra*.

As this Honorable Court has noted, when Congress has intended materials and reports not to be subject to compulsory process, it has said so. See, i.e., *St. Regis Paper Co. v. U.S.*, 368 U.S. 208, 219 (1961).

Congress has said so about the material sought to be discovered by the plaintiffs in this tort suit. As with the similar statutes, this explicit expression of Congress' intent should be enforced by this Honorable Court by granting the writ request and reversing the decision of the Washington State Supreme Court.

4. The interpretation of this statute is an important federal question that has not been previously addressed by this Honorable Court and is necessary for the continued proper application of the various federal highway safety improvement programs

The State of Louisiana joins in the request of its fellow *amici* and argues that the intervention of this Court is necessary to resolve the conflict between the Washington State Supreme Court and other courts that have considered the same issue. As pointed out above and by the

other *amici*, all of the courts which have considered the constitutionality of § 409 and its restrictions on discovery and evidentiary use in a suit for damages have upheld its constitutionality and several courts have also determined that § 409 specifically pre-empts state discovery and evidentiary rules under the Supremacy Clause. However, many states have not addressed this issue and there are no federal appellate decisions on the subject.

The interpretation of this federal statute has not been subject to the previous review of this Honorable Court. Absent such review, the lower courts have interpreted the statute in an inconsistent and often conflicting manner and have failed to recognize and enforce congressional intent.

The failure of this Honorable Court to grant this writ on this important federal issue will leave the interpretation of a declaration of Congress to the various states, some of which will declare it unconstitutional *de jure* as has the State of Washington, others of which will render it unconstitutional *de facto* by continuing to either ignore its application or circumvent congressional intent.

The granting of this writ for this reason alone is proper.

CONCLUSION

The petition by Pierce County for a writ of certiorari should be granted to resolve the conflict between the Washington State Supreme Court and the state Supreme Courts of Missouri, Mississippi, and Louisiana, to enforce the power of Congress afforded it by the Constitution, to prevent a disparate interpretation of similar federal statutes, and to provide guidance to the other courts of this country on an important federal question.

Respectfully submitted,

RICHARD P. IEYOUB
Attorney General
JOHN C. YOUNG*
JAMES R. DAWSON
Assistant Attorneys General
626 N. 4th Street, Fifth Floor
Baton Rouge, Louisiana 70804-9095
(225) 342-8717

and

LAWRENCE A. DURANT
General Counsel, State of Louisiana, Department of Transportation and Development
P. O. Box 94245
1201 Capitol Access Road
Baton Rouge, LA 70804-9245
(225) 379-1207

**Counsel of Record for Amicus Curiae*

MOTION FILED
MAR 2 1 2002

(4)

No. 01-1229

IN THE

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIONO GUILLEN, as Legal Guardian of PAULINA GUILLEN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Supreme Court of Washington

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

HENRY W. UNDERHILL, JR.*
General Counsel/Executive Director
LANI L. WILLIAMS
Associate Counsel
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
1110 Vermont Avenue, N.W.
Suite 200
Washington, D.C. 20005
(202) 466-5424

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

12 pp

IN THE

Supreme Court of the United States

No. 01-1229

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIONO GUILLEN, as Legal Guardian of PAULINA GUILLEN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Supreme Court of Washington

---

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAS* SUPPORTING PETITIONER PIERCE COUNTY

Pursuant to this Court's Rule 37.3(b), of this Court, this *amicus curiae* respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the Petitioner. A letter of consent from the Petitioner to the filing of this brief has been filed with the Clerk. However, consent was not obtained from the Respondents.

IMLA is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Since its establishment, IMLA advocates for the rights and privileges of local governments, and the attorneys who represent them, through its Legal Advocacy Program. Specifically, the Legal Advocacy Program of IMLA serves the membership by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as an amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA's specific interest in this case lies in the impact the case below has on governments throughout Washington State and the Nation as a whole. Over 39,000 local governments (counties, towns and municipalities) exists in the United States. Many of these entities have some form of policing responsibility, including responding to accident scenes and preparing accident reports. Many of these entities also are responsible for maintaining some part of the 3.9 million miles of highways and roads in the United States. The Supreme Court of Washington's decision allowing the discovery and admissibility of accident reports, and related materials, used to identify hazardous roadway locations effectively creates a situation of *per se* liability on behalf of local governments.

IMLA, as an organization promoting legal issues on behalf of local governments, therefore, files this brief on behalf of its members nationwide.

Respectfully submitted,

HENRY W. UNDERHILL, JR.*
General Counsel/Executive Director
LANI L. WILLIAMS
Associate Counsel
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION
1110 Vermont Avenue, N.W.
Suite 200
Washington, D.C. 20005
(202) 466-5424

*Counsel of Record

March 27, 2002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	1
I. Pierce County's Petition For Certiorari Should be Granted Because The Decision of the Supreme Court of Washington Conflicts with Other States' Courts of Last Resort	2
II Pierce County's Petition For Certiorari Should be Granted Because The Washington Supreme Court Has decided an Important Question of Federal Law Which Should be Settled By This Court	3
CONCLUSION	6

TABLE OF AUTHORITIES

CASES Page

Claspill v. Missouri Pacific R.R. Co., 793 S.W.2d 139 (Mo. 1990) 3

Guillen v. Pierce County, 31 P.23 628, 647 (2001) ..... *passim*

Sawyer v. Illinois Cent. Cent. Gulf R.R. Co., 606 So.2d 1069 (Miss. 1992) 3

Wiedeman v. Dixie Elec. Membership Corp., 627 So.2d 170, 172 (La. 1993), *cert. denied, Louisiana Dept. of Transp. and Dev. v. Wiedeman*, 511 U.S. 1127 (1994). 2

STATUTES

23 U.S.C. § 409 ..... *passim*

IN THE

Supreme Court of the United States

No. 01-1229

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIONO GUILLEN, as Legal Guardian of PAULINA GUILLEN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Supreme Court of Washington

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The interest of the International Municipal Lawyers Association ("IMLA"), as amicus curiae, is set forth in the motion accompanying this brief.[1]

[1] Pursuant to this Court's Rule 37.6, the amicus curiae represents that this brief was not authored in whole or in part by counsel for any party,

SUMMARY OF THE ARGUMENT

The Washington Supreme Court erred when is held that Congress acted outside its authority in passing 23 § 409. This ruling has potentially severe consequences on local governments in Washington State, and throughout the Nation as a whole.

ARGUMENT

This matter centers on the proper interpretation and constitutionality of 23 U.S.C. § 409. The Respondents alleged that Pierce County was aware of hazardous traffic conditions which contributed to their accidents and did nothing to rectify the conditions. The Supreme Court of Washington determined that 23 U.S.C. § 409 makes state and local accident material and data (which are collected in an effort to rectify dangerous road conditions and to obtain federal funding) non-discoverable and inadmissable in state and federal court proceedings. *Guillen v. Pierce County*, 31 P.3d 628, 647 (2001). The court further held that Congress violated the Tenth Amendment by enacting this statute. *Guillen*, 31 P.3d at 743-4. Therefore, the court ruled that data collected by Pierce County for the purpose of identifying hazardous traffic areas was discoverable and admissible. This ruling by the Supreme Court of Washington was in error and should be reversed.

I. PIERCE COUNTY'S PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE SUPREME COURT OF WASHINGTON CONFLICTS WITH OTHER STATES' COURTS OF LAST RESORT

The Washington Supreme Court held that while the statute

---

and that no person or entity other than the amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

was an attempt to preempt state rules regarding discovery and admissibility, Congress was without authority to do so. The court held that the states are not able to ratify Congress' unconstitutional action by participating in the federal highway funds program. The court also held that the Spending Clause, Commerce Clause, and Necessary and Proper Clause did not give Congress the power to interfere with state court procedure. These are contrary to the rulings of the courts of last resort of other States.

For instance, in 1993, the Louisiana Supreme Court held that 23 U.S.C. § 409 preempted conflicting state law. *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So.2d 170, 172 (La. 1993), *cert. denied, Louisiana Dept. of Transp. and Dev. V. Wiedeman*, 511 U.S. 1127 (1994). The court specifically held that the Supremacy Clause provided the vehicle for overriding state law. *Wiedeman*, 627 So.2d at 172.

In ruling on the ability of the federal government to dictate the manner by which states may receive federal funding, the Mississippi Supreme Court also upheld § 409. *Sawyer v. Illinois Cent. Cent. Gulf R.R. Co.*, 606 So.2d 1069 (Miss. 1992). This ruling echoed a similar holding by the Missouri Supreme Court that § 409 was a valid exercise of Congress' power under the Commerce Clause, U.S. Const., art I, § 8, cl. 3). *Claspill v. Missouri Pacific R.R. Co.*, 793 S.W.2d 139 (Mo. 1990).

This conflict among the State regarding an issue of federal law should be resolved by this Court.

II. PIERCE COUNTY'S PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE WASHINGTON SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

This case presents an important question as to the interpretation of federal law which will affect all local governments in the State of Washington and will likely be relied upon by other jurisdictions to the extent that local governments assert the § 409 privilege.

Interestingly, the Washington Supreme Court recited the history and important purpose behind § 409, yet nonetheless held the statute unconstitutional. The court recognized that § 409 was passed in response to the unexpected consequences of passing § 152 in 1973. Subsequent to passing § 152, which required states to identify public roads that may constitute a danger to the public and rank the most dangerous in writing, private plaintiffs obtained an added advantage in their litigation efforts to prove that local governments had been negligent in designing and maintaining traffic sites. By simply requesting this compiled information, plaintiffs suddenly had a "virtually no-work tool" for use in litigation against local governments. *Guillen*, 31 P.3d. at 717.

In 1987, Congress enacted 23 U.S.C. § 409 and courts tended to interpret the privilege as applying only to reports and surveys which were *specifically created* for the purpose of applying for federal improvement funds. *Guillen*, 31 P.3d. at 717-22. The courts voiced strong objections to the idea that traffic and accident materials were exempt simply because they were *collected* for uses related to a request for funds, especially to the extent that such an interpretation was seen as an attempt by the federal government to regulate the state court systems. *Guillen*, 31 P.3d. at 717-22.

In 1995, Congress disagreed with the limiting interpretation of the state courts and amended § 409 to include "or collected" in the text of the statute. *Guillen*, 31 P.3d. at 723. At the same time, Congress issued a clarification in the Congressional Record, noting that it intended that data collected for safety reports or surveys should not be subject to discovery or admitted in federal or state courts. *Guillen*, 31 P.3d. at 723. "It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mention[ed] or addressed in such data." H.R. Rep. 104-246 § 328, at 59 (1995).

As can be seen from the Washington Supreme Court's own recitation of the motivation behind § 409, Congress understood the consequences of requiring states and local governments to collect and maintain information regarding hazardous roadways. As of June 1997, there existed in the United States over 3,000 county governments and over 36,000 municipal and township governments. These governments collect a substantial amount of data regarding hazardous, or potentially, road conditions in the United States. These materials are collected for the purposes of improving those conditions in the most timely and economically efficient manner. Litigants should not be allowed to support their claims for monetary damages against local governments based on these materials. To do so would severely burden already overburdened local government finances.

CONCLUSION

For the foregoing reasons, the International Municipal Lawyers Association respectfully requests that this Court grant Pierce County's petition for certiorari.

Respectfully submitted,

HENRY W. UNDERHILL, JR.*
General Counsel/Executive Director
LANI L. WILLIAMS
Associate Counsel
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION
1110 Vermont Avenue, N.W.
Suite 200
Washington, D.C. 20005
(202) 466-5424

* Counsel of Record

March 27, 2002

MOTION FILED

MAR 2 7 2002

(7)

No. 01-1229

IN THE

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULA GUILLEN and FATIMA GUILLEN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Washington

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

LOUIS P. WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
Law Department
50 F Street, N.W.
Washington, D.C. 20001-1564
(202) 639-2505

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ROBERT N. HOCHMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for the Association of American Railroads

March 27, 2002

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

28pp

No. 01-1229

IN THE

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and A'.MA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULA GUILLEN and FATIMA GUILLEN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Washington

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Amicus curiae Association of American Railroads ("AAR") respectfully requests leave of this Court to file the following Brief in the above captioned matter. In support of its motion, AAR states as follows:

1. AAR requested the consent of both petitioner and respondents to file an *amicus curiae* brief in this case. The petitioner granted its consent in writing. Petitioner's written consent is being filed simultaneously with this Brief and Motion. Respondents refused their consent.

2. AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently

appears before Congress, administrative agencies, and the courts on behalf of the railroad industry.

AAR and its members have a substantial interest in vigorous enforcement of 23 U.S.C. § 409 because it plays an important role in the federal government's effort to promote railroad crossing safety. Section 409 specifically exempts from discovery or admission into evidence certain information "compiled or collected for the purpose of" promoting railway-highway crossing safety pursuant to 23 U.S.C. § 130. Congress chose to exempt this information from use in civil litigation to ensure that the program most effectively promotes safety. Denying § 409 its full effect, as the Washington Supreme Court has in this case, increases the cost to States and railroads of collecting and compiling crucial safety-related information and undermines the efficacy of the safety program, thus making railroad operation more hazardous.

3. AAR believes that its familiarity with the operation of important federal highway safety programs, such as the Railroad-Highway Crossing Safety Program, will aid in the Court's understanding of the issues presented in the Petition for Certiorari. This brief presents statutory background and legal analysis supplemental to that in the petition.

Respectfully submitted,

LOUIS P. WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
Law Department
50 F Street, N.W.
Washington, D.C. 20001-1564
(202) 639-2505

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ROBERT N. HOCHMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for the Association of American Railroads

* Counsel of Record

March 27, 2002

QUESTION PRESENTED

Whether 23 U.S.C. § 409, which protects specified information "compiled or collected" in connection with certain federal highway safety programs from being subject to discovery, admitted into evidence, or being considered for any other purpose in any federal or state action for damages, is a valid exercise of Congress's power pursuant to the Spending Clause, the Commerce Clause or the Necessary and Proper Clause of the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
STATEMENT	2
A. Statutory Background	2
1. The Origins Of Coordinated Federal-State Highway Safety Programs	3
2. The Administrative Scheme	4
3. The Role of Section 409	6
B. The Decision Below	9
REASONS FOR GRANTING THE PETITION	11
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

	Page
City of Atlanta v. *Watson*, 475 S.E.2d 896 (Ga. 1996)	19
Claspill v. *Missouri Pac. R.R.*, 793 S.W.2d 139 (Mo. 1990)	12
Coniker v. *State*, 695 N.Y.S.2d 492 (N.Y. Ct. Cl. 1999)	7, 12
Gibbs v. *Babbitt*,214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001)	18
Guillen v. *Pierce County*, 31 P.3d 628 (Wash. 2001)	9, 10, 14, 17, 18
Harrison v. *Burlington N. R.R.*, 965 F.2d 155 (7th Cir. 1992)	7
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964)	17
Hodel v. *Indiana*, 452 U.S. 314 (1981)	10, 13, 15, 16, 17
John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989)	19
Light v. *State*, 560 N.Y.S.2d 962 (N.Y. Ct. Cl. 1990)	7
McCulloch v. *Maryland*, 17 U.S. (4 Wheat) 316 (1819)	15
New York v. *United States*, 505 U.S. 144 (1992)	13
Palacios v. *Louisiana & Delta R.R.*, 775 So. 2d 698 (La. Ct. App. 2000)	11, 14
Reichert v. *State Dep't of Transp. & Dev.*, 694 So. 2d 193 (La. 1997)	7
Robertson v. *Union Pac. R.R.*, 954 F.2d 1433 (8th Cir. 1992)	7, 12, 19
Sawyer v. *Illinois Cent. Gulf R.R.*, 606 So. 2d 1069 (Miss. 1992)	12
Seaton v. *Johnson*, 898 S.W.2d 232 (Tenn. Ct. App. 1995)	12
South Dakota v. *Dole*, 483 U.S. 203 (1987)	13, 14

TABLE OF AUTHORITIES—continued

	Page
Southern Pac. Transp. Co. v. *Yarnell*, 890 P.2d 611 (Ariz. 1995)	8
United States v. *Lopez*, 514 U.S. 549 (1995)	11, 15, 18
United States v. *Morrison*, 529 U.S. 598 (2000)	11, 15, 16, 18
Wiedeman v. *Dixie Elec. Membership Corp.*, 627 So. 2d 170 (La. 1993)	8

STATUTES AND REGULATION

	Page
Federal-Aid Highway Act of 1970, Pub. L. 91-605, 84 Stat. 1713	4
23 U.S.C. § 101(b)	16
§ 130	2, 5, 6
§ 144	4, 5
§ 152	5, 6
§ 409	2, 7, 14
45 U.S.C. §§ 51-60	12
23 C.F.R. § 924.9(a)(1)	5, 9
§ 924.13(a)(2)	6, 9
§ 924.15	8

LEGISLATIVE HISTORY

	Page
H.R. Rep. No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859	3
H.R. Rep. 104-246 (1995), *reprinted in* 1995 U.S.C.C.A.N. 522	8
H.R. Conf. Rep. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679	8

RULE

	Page
Sup. Ct. R. 10(c)	11

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES — Page

Federal R.R. & Highway Admins., U.S. Dep't of Transp, *Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem* (1972) 3

Federal R.R. & Highway Admins., U.S. Dep't of Transp., *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* (1972) 3

U.S. Dep't of Transp., *National Railroad-Highway Crossing Inventory Update Manual* (1976) 6

U.S. Dep't of Transp., *Traffic Safety Facts 1998* (1999) 4

U.S. Gov't Accounting Office, *Report to Congressional Requesters, Railroad Safety: Status of Efforts to Improve Railroad Crossing Safety* (Aug. 1995) 4, 5

IN THE
Supreme Court of the United States

No. 01-1229

PIERCE COUNTY,
Petitioner,

v.

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULA GUILLEN and FATIMA GUILLEN,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* *

The Association of American Railroads ("AAR") is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry.

Vigorous enforcement of 23 U.S.C. § 409 is a matter of substantial concern to railroads because it plays an important

* Pursuant to Rule 37.6 of the Rules of the Court, *amicus* states that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

role in the federal government's effort to promote railroad crossing safety. Section 409 specifically exempts from discovery or admission into evidence certain information "compiled or collected for the purpose of" promoting railway-highway crossing safety pursuant to 23 U.S.C. § 130 ("Section 130 program"). Section 130 makes federal funds available for use in improving safety at railway-highway crossings. Congress chose to exempt this information from use in civil litigation to ensure that the program most effectively promotes safety. To deny § 409 its full effect, as the Washington Supreme Court has in this case, directly harms railroads in two ways. First, by increasing the cost to States and railroads of collecting and compiling this crucial safety-related information, the Washington Supreme Court's decision undermines the efficacy of the safety program, thus making the operation of railroads more hazardous. Second, contrary to Congress's intent, it leaves railroads exposed to damages based on information that the railroads themselves are required to collect and submit to state departments of transportation (and the Federal Railroad Administration) for compilation in an effort to promote safety.

STATEMENT

The ruling issued by the Washington Supreme Court will have a dramatic impact on how important federal highway safety programs function. Therefore, this Court may find it useful to understand the historical circumstances that spurred the creation of the federal highway safety programs, the relevant details of those programs, and their relationship to § 409. With that background, the impact of the Washington Supreme Court's decision can be fully appreciated.

A. Statutory Background.

Section 409 is a crucial component of three distinct federal highway safety programs: The Railway-Highway Crossing Program (§ 130), The Highway Bridge Replacement and

Rehabilitation Program (§ 144), and The Hazard Elimination Program (§ 152). These programs were created by federal highway legislation from the 1970s that displaced a traditionally political process for identifying and funding highway projects. Congress enacted a new data-driven, administrative model for prioritizing highway safety projects. The new model has saved thousands of lives.

1. The Origins Of Coordinated Federal-State Highway Safety Programs.

As the nation's highway system grew through the 1960s and early 1970s, the nation experienced a troubling growth in traffic accidents. By 1973 Congress voiced concern about an "escalating tide of mayhem on our highways," noting that in 1972 the nation lost over $40 billion and 56,000 lives, and more than 4 million persons were injured. H.R. Rep. No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1888-89. Of particular concern to *amicus*, through the late 1960s, the nation was experiencing a high volume of railroad crossing casualties and fatalities. See Federal R.R. & Highway Admins., U.S. Dep't of Transp., *Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem* 6 tbl.1 (1972).

Congress recognized "the necessity for improved coordination and cooperation on a program and project level between Federal, State and local authorities, and between the public and private sectors," noting the need for a "multi-pronged attack on those highway-related factors which contribute most to accidents." H.R. Rep. No. 93-118, *reprinted in* 1973 U.S.C.C.A.N. at 1889. The Secretary of Transportation had already concluded that an effective effort to improve railroad crossing safety would require "national coordination." Federal R.R. & Highway Admins., U.S. Dep't of Transp., *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* iii (1972).

These federal highway programs have played an instrumental role in the dramatic reduction of highway fatalities over the last three decades. See U.S. Dep't of Transp., *Traffic Safety Facts 1998*, at 15 tbl.2 (1999) (69% decline from 1968 to 1998 in fatality rate per 100 million vehicle miles traveled). The Section 130 program, for example, has helped reduce the number of accidents and fatalities at railroad crossings. In the late 1970s, there were an average of 864 fatalities and 11,516 accidents per year. U.S. Gov't Accounting Office, *Report to Congressional Requesters, Railroad Safety: Status of Efforts to Improve Railroad Crossing Safety* 18 (Aug. 1995) ("GAO Report"). The federal government estimates that the Section 130 program had, by May 1994, "prevented more than 7,600 fatalities and 33,500 nonfatal injuries." *Id.* But despite such advances, there remains much to be done. "Accidents at railroad crossings are the leading cause of deaths associated with the railroad industry; almost half of all rail-related deaths in the United States are the result of collisions of trains and vehicles at public railroad crossings." *Id.* at 2.

2. The Administrative Scheme.

Congress first implemented an administrative-based federal highway safety program in the Federal-Aid Highway Act of 1970. In that watershed legislation, Congress mandated that any State participating in the federal highway program establish "a State agency which shall have adequate powers, and be suitably equipped and organized to carry out" the program. Pub. L. 91-605, § 203(a), 84 Stat. 1713, 1741 (1970) (amending 23 U.S.C. § 402(b)(1)(A)). Congress, at first, focused on bridges. A new program, codified at 23 U.S.C. § 144, called for the States and the federal government to "inventory all bridges located on any of the Federal-aid systems ...[, to] classify them according to their serviceability, safety, and essentiality for public use; and ... based on that classification, assign each a priority for replacement." Pub. L. 91-605, § 204(a), 84 Stat. at 1742.

The basics of the data-driven approach were thus put in place: (1) identify all relevant highway locations, (2) prioritize individual locations in terms of public importance and safety risks presented, and (3) direct funds to the locations which promise the greatest public safety return on the public's investment. This approach recognizes that "[m]aximizing the return from federal funds requires targeting them to the greatest need." GAO Report at 4. To direct federal funds properly, the federal government must have at its disposal a comprehensive account of accidents and analysis of how best to avoid them.

This model was carried forward into the Railway-Highway Crossing Program (§ 130) and the Hazard Elimination Program (§ 152). The Section 130 program requires the States to "systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. § 130(d). The Hazard Elimination Program, which is directed at various hazards (such as poor marking or roadside obstacles) on roads and at intersections, similarly requires the systematic gathering of data and prioritizing of safety-related projects. *Id.* § 152(a).

Congress deemed cooperation between State and Federal entities critical to the success of the data-gathering and prioritizing model of the new federal schemes. Section 144 requires the Secretary of Transportation, working with the States, to gather the relevant information on bridges. *Id.* § 144(b)-(c). Sections 130 and 152 place the primary data-gathering responsibilities on the States. *Id.* §§ 130(d), 152(a). For example, the regulations enacted pursuant to § 130 require the States, *inter alia*, to "collect[] and maintain[] a record of accident, traffic, and highway data, including, for railroad-highway grade crossings, the characteristics of both highway and train traffic," 23 C.F.R. § 924.9(a)(1), and to create a "record of accident experience before and after the

implementation of a highway safety improvement project," *id.* § 924.13(a)(2). Both §§ 130 and 152 contemplate federal oversight. 23 U.S.C. §§ 130(g), 152(g).

Further, private entities play a crucial role in the success of federal safety programs. The Department of Transportation has recognized that while "local, State, and Federal agencies have collected and maintained information about railroad-highway crossings, most crossing information systems [had] been fragmented and incomplete." U.S. Dep't of Transp., *National Railroad-Highway Crossing Inventory Update Manual* B-1 (1976) ("Update Manual"). Because railroad crossing safety data "can continue to be useful only if maintained and updated" as incidents occur, *id.* at A-1, the Department of Transportation solicited and received the cooperation of the railroad industry in the data-gathering endeavor. The railroads and the government, for example, equally shared the cost of developing a "'Comprehensive National Railroad-Highway Crossing Information and Numbering System.'" *Id.* at B-1. The Update Manual establishes procedures that are "designed to ensure availability and use of an up-to-date railroad-crossing data base and to ensure continued use of the channels of communication [between various public and industry entities] established during the initial inventory," and assigns specific data collection tasks to the States and to the railroads. *Id.* at C-1, C-3 & tbl.1.

3. The Role of Section 409.

As the highway-safety legislation was implemented, it became clear that the effective administration of these programs was undermined by the threat of tort litigation. Implicit in the federally mandated prioritization programs is the understanding that funds are not available for immediate rectification of all highway safety risks; this is a long-term effort in which even known, risky situations would be left unaddressed so that resources could be spent on the locations posing the greatest dangers to life and health. The programs,

as described above, required comprehensive data gathering and analysis, even of the unimproved sites. The Solicitor General has observed the concern this creates:

> If reports and data concerning potential highway safety hazards are subject to discovery in tort actions, States and private parties will likely be deterred from compiling complete and accurate information about such hazards. As a result, federal highway safety programs—which depend on information about safety problems provided by the States and private entities such as railroads—will be jeopardized.

Brief for the United States as *Amicus Curiae* at 6, *State of Alabama Highway Dep't* v. *Boone*, No. 90-1412 (U.S. 1991). Indeed, § 409 grew out of a proposal by the Federal Highway Administration, made at the behest of the States, to address precisely this fear. *Id.* at 10.

To ensure that the States' data collection and analysis procedures required by the federal program are exhaustive and candid, Congress enacted 23 U.S.C. § 409. Section 409 ensures that the safety related information collected and compiled by the States and private entities is not used as a tool in private litigation against the very parties assisting the public safety effort.[1] In short, Congress has determined that the benefit to public safety of nondisclosure outweighs the interests individual plaintiffs have in access to this information. *Coniker* v. *State*, 695 N.Y.S.2d 492, 495 (N.Y. Ct. Cl. 1999).

Over the years, Congress has amended § 409 to ensure that its underlying purpose receives full effect from both federal and state courts. For example, before 1991 § 409 specifically excluded the protected material from admission in evidence,

---

[1] *Harrison* v. *Burlington N. R.R.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson* v. *Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992); *Reichert* v. *State Dep't of Transp. & Dev.*, 694 So. 2d 193, 197 (La. 1997).

but said nothing about discovery. As a result, some courts permitted discovery of the information even though such information was inadmissible. See *Light* v. *State*, 560 N.Y.S.2d 962, 965 (N.Y. Ct. Cl. 1990). In 1991 Congress amended § 409 to make clear that the protected material was neither discoverable nor admissible in evidence. H.R. Conf. Rep. 102-404, at 332 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1712.

In addition, throughout the 1990s some court decisions had undermined § 409's basic purpose by concluding that it did not exclude the "raw data" that formed the bases of the reports that States would submit to the federal government when applying for federal funds.[2] In 1995, Congress corrected these misinterpretations by amending the statute to protect information "compiled or collected," whereas before the statute had only said that information "compiled" was protected. Congress explained the change:

> It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such data.

H.R. Rep. 104-246, at 59 (1995), *reprinted in* 1995 U.S.C.C.A.N. 522, 551. Put another way, Congress intended to protect more than the formal report that regulations required the States to submit to the federal government. See, *e.g.*, 23 C.F.R. § 924.15. Congress also wanted to protect the

---

[2] *See, e.g.*, *Wiedeman* v. *Dixie Elec. Membership Corp.*, 627 So. 2d 170, 173 (La. 1993) (holding that previous version of § 409 protects a state's end-product analysis of data, but not the "unedited factual material" collected to produce the end product); *Southern Pac. Transp. Co.* v. *Yarnell*, 890 P.2d 611, 613 (Ariz. 1995) (holding that pre-1995 version of § 409 does not protect the accident reports that are themselves compiled pursuant to § 409).

data that other regulations required the States to collect in connection with the program. See, *e.g.*, *id.* §§ 924.9(a)(1), 924.13(a)(2).

B. The Decision Below.

A bare majority of the Washington Supreme Court has concluded that Congress lacked the authority to ensure that § 409 had the reach required to accomplish its purposes. The court did not question Congress's "authority to enact § 409 in its *pre* 1995 form, insofar as the privilege was understood to apply only to materials and data created *exclusively* to comply with the federal government's mandates" in the relevant highway safety statutes. *Guillen* v. *Pierce County*, 31 P.3d 628, 647 n.26 (Wash. 2001). The court believed Congress had the power to render those documents privileged because "*but-for* the federal mandates, such materials would not exist." *Id.* at 651. But when Congress amended § 409 in 1995, it brought within its sphere of protection documents that would have existed even without the various federal highway safety programs. This, in the court's view, unconstitutionally "intrude[d] upon state sovereignty by barring state and local courts from admitting into evidence or allowing pretrial discovery of routinely created traffic and accident related materials ... essential to the proper adjudication of claims brought under state and local law." *Id.* at 655. Thus, the court limited the effect of § 409 to materials "that are *originally* 'compiled'—i.e., created, composed, recorded—for the *specific* purpose[s]" connected with the various federal highway safety programs. *Id.*

The Washington Supreme Court considered and rejected three different grounds for upholding § 409. First, although recognizing that the Spending Clause permits Congress to "offer states the option of accepting federal funds 'with strings attached'—even when those 'strings' interfere with the basic functioning of state government," the court concluded that "no valid federal interest in the operation of the federal safety enhancement program is reasonably served"

by privileging materials that would have been created even if the federal program did not exist. *Id.* at 651.

Second, the court recognized that legislation designed to promote safety on the nation's public highways is a valid exercise of Congress's authority under the Commerce Clause to "'regulate and protect the instrumentalities of interstate commerce.'" *Id.* at 653 (quoting *United States* v. *Lopez*, 514 U.S. 549, 558 (1995)). But, purporting to rely on *Hodel* v. *Indiana*, 452 U.S. 314, 329 n.17 (1981), the court concluded that even if the "'regulatory scheme when considered as a whole'" is valid, a specific federal statute could be declared unconstitutional if a court were to find it was not an "'integral part'" of that general regulatory scheme. *Guillen*, 31 P.3d at 654 (quoting *Hodel*, 452 U.S. at 329 n.17). Mimicking its Spending Clause analysis, the court held that privileging materials that "would exist even had a federal safety enhancement program never been created" could not be "characterized as an 'integral part' of the Federal-aid highway system's regulation." *Id.* at 654. Finally, the court determined that the Necessary and Proper Clause did not authorize § 409, for essentially the same reasons. *Id.* at 654-55.

The court held that under its narrowed version of § 409, Pierce County must disclose four out of five items described in its opinion. *Id.* at 655-56. Those items include two sets of accident reports collected by location in order to comply with the relevant federal highway safety program, and two collision diagrams used to determine whether the design of the intersection was a causative factor in the accidents described, which is also required by federal law. *Id.* at 634 & n.1.

Three justices would have upheld § 409 by interpreting it to protect only documents held in a collection by the state agency charged with complying with federal highway-safety program regulations. *Id.* at 657-59 (Madsen, J., concurring). Put concretely, when an accident occurs, law enforcement officials arrive on the scene and record certain information concerning the accident. Law enforcement officials may

maintain that report in their files. State highway safety officials gather copies of all such reports into their own files for analysis in compliance with federal highway-safety program regulations. The majority reads § 409 to cover both the accident report in the highway safety official's files and the law enforcement official's files. The concurrence reads it to cover only the report in the highway-safety official's files.

REASONS FOR GRANTING THE PETITION

The Washington Supreme Court has held that the Constitution forbids Congress to exempt from discovery and admission into evidence various materials that the States and private entities collect and compile for the purpose of determining how to best to direct federal highway safety funds. This Court has not hesitated to review lower court decisions that, like this one, break new ground and strike down federal statutes for exceeding Congress's delegated powers under Article I, Section 8. *United States* v. *Morrison*, 529 U.S. 598, 605 (2000); *United States* v. *Lopez*, 514 U.S. 549, 552 (1995). Because the striking down of a federal statute as unconstitutional is a serious judicial intervention into the democratic process, it represents the archetypal "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Review is especially important in this case because the Washington Supreme Court's ruling effectively narrows § 409 in a way that conflicts with the rulings of other courts, and thus jeopardizes the uniform administration of an important federal safety program that relies on uninhibited disclosure and analysis of data. One other state court has specifically concluded that the 1995 amendment to § 409 is constitutional. *Palacios* v. *Louisiana & Delta R.R.*, 775 So. 2d 698, 703 (La. Ct. App. 2000) (upholding § 409 under Spending Clause, rejecting 10th Amendment challenge). Three other courts, both before and after the 1995 amendment, have applied § 409 to materials that were not

created solely for the purpose of complying with any of the federal highway safety programs, and have done so without questioning the constitutionality of § 409. *Coniker*, 695 N.Y.S.2d at 496 (holding that post-1995 version of § 409 applies to information that the New York Transportation Department officials would have collected even if the federal highway safety programs did not exist); *Robertson* v. *Union Pac. R.R.*, 954 F.2d 1433, 1435 n.3 (8th Cir. 1992) (holding that pre-1995 statute applied to certain information even though it "was not collected or utilized solely for federal funding projects"); *Seaton* v. *Johnson*, 898 S.W.2d 232, 236 (Tenn. Ct. App. 1995) (applying pre-1995 statute and holding that "[i]t would be an anomaly for this Court to deny access to the State's copy of its report to the federal government only to require the State to compile from its records a report to plaintiff identical with that furnished to the federal government").[3] This Court should grant the petition for certiorari to ensure the uniform application of § 409, which will provide for the most effective implementation of the federal highway safety programs.

Additionally, the Washington Supreme Court's narrowing of § 409 creates an especially urgent need for this Court's review. As a result of the court's ruling, § 409 has a different scope in federal and state courts within Washington state. Not only is this plainly contrary to Congressional intent, but it invites forum shopping. Tort plaintiffs in Washington, whether suing under state or federal law (such as the Federal Employers Liability Act, 45 U.S.C. §§ 51-60) will seek the weakened application of § 409 in state court.

---

[3] In addition, two other state supreme courts have rejected challenges to the constitutionality of the pre-1995 version of § 409 without elaborating on that version's scope. *Sawyer* v. *Illinois Cent. Gulf R.R.*, 606 So. 2d 1069, 1072-74 (Miss. 1992); *Claspill* v. *Missouri Pac. R.R.*, 793 S.W.2d 139 (Mo. 1990).

Finally, as demonstrated below, the Washington Supreme Court's conclusion is not only out of step with other courts around the nation, but also distorts this Court's Spending Clause and Commerce Clause jurisprudence. The Washington Supreme Court's Spending Clause analysis cannot be squared with this Court's analysis in *South Dakota* v. *Dole*, 483 U.S. 203 (1987). In addition, based on its misreading of this Court's decision in *Hodel* v. *Indiana*, 452 U.S. 314 (1981), the Washington Supreme Court has announced a new rule of Commerce Clause jurisprudence that conflicts with the rule in the Fourth Circuit, inviting courts to second guess Congress's decision about how best to accomplish its legitimately chosen ends.

Spending Clause. Congress has broad power to impose conditions upon a state's voluntary receipt of federal funds. The reason is simple. When the receipt of federal funds is the product of a state's voluntary choice, any conditions attached to those funds are themselves accepted by the state voluntarily as well. Far from an affront to principles of federalism, Spending Clause conditions respect those principles by permitting federal and state governments to cooperate in advancing the general welfare. *New York* v. *United States*, 505 U.S. 144, 167-68 (1992).

The Washington Supreme Court's decision is flatly contrary to this Court's Spending Clause analysis in *South Dakota* v. *Dole*, 483 U.S. at 208 n.3. In *Dole*, the Court found that the relationship between a uniform drinking age and Congress's goal of promoting safe use of federally funded highways was sufficiently close to satisfy the Spending Clause. *Id.* at 208-09. The fact that the drinking age condition was overinclusive did not lead the Court to invalidate it. See *id.* at 214-15 (O'Connor, J., dissenting) (noting that drinking age restriction was overinclusive because it stopped youths from drinking even when they were not planning on driving). Though this Court in *Dole* left open precisely how closely related a condition must be to

Congress's legislative purpose, *id.* at 208 n.3, the facts of *Dole* make clear that if the condition advances the goal, the fact that it is overinclusive does not invalidate the condition.

The Washington Supreme Court, relying largely on Justice O'Connor's dissent in *Dole*, ruled that the 1995 amendment to § 409 is beyond Congress's Spending Clause power because it is overinclusive. The court's analysis is wrong. There is nothing fatally overinclusive in protecting data and reports "compiled or collected for the purpose of" highway safety evaluations, which are conducted "pursuant to" federal statute. 23 U.S.C. § 409. Further, as *Dole* makes clear, any overinclusivity is constitutionally irrelevant. The state court did not deny that Congress can require the States to engage in extensive data-gathering and analysis as a condition on receiving federal highway funds. Moreover, the court never denied that privileging the results of those efforts advances Congress's valid goal of ensuring safety through thorough data-gathering and analysis. Yet the court struck down § 409 because, in its view, Congress cannot enforce privileges in state court for data and documents that were created for other purposes (even if the only reason for maintaining a compilation of those documents by highway site is the mandate of the federal programs). *Guillen*, 51 P.3d at 645-46, 651, 655. In short, the Washington Supreme Court never denied that the 1995 amendment to § 409 advances Congress's legitimate interests. The court simply concluded that it swept in too much material, and struck down the amendment in its entirety. This is contrary to *Dole*.

In contrast to the Washington Supreme Court, the Louisiana Court of Appeals has properly applied *Dole* to the 1995 amendments to § 409. The Louisiana court has concluded that § 409 is within Congress's Spending Clause power because it is closely enough related to the federal interest of "'encourag[ing] participation in a scheme that ensures, by prioritization, deliberative spending of federal funds.'" *Palacios*, 775 So. 2d at 703.

Dole aside, the statute is unquestionably valid because it is "necessary and proper" to Spending Clause legislation. Section 409 is not structured as a "condition" on the receipt of federal funds at all. The Spending Clause "condition" imposed on the States requires data-collection and analysis. Section 409 is a substantive rule of law, applicable in all federal and state courts, that encourages thoroughness by precluding access to, use of, or reliance upon data and analysis generated by the federal programs. For example, if suit were brought in a state that had declined federal highway funds, but the underlying accident had occurred in a state that had accepted those funds, § 409 would still prevent the plaintiff from obtaining the data collected pursuant to federal programs in connection with the accident location. Such a result is proper because Congress has the power to ensure that its Spending Clause programs function properly. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

Congress wanted states and private entities to be free of concern when collecting and analyzing highway safety data. The 1995 amendment advances that goal. The Washington Supreme Court, employing a narrow view of Congress's Spending Power in conflict with this Court's decision in *Dole*, has undermined that purpose and produced uneven application of § 409. This Court should clarify the scope of the Spending Power and in the process ensure uniform application of § 409.

Commerce Clause. The Washington Supreme Court has badly misread this Court's decisions in *Hodel* v. *Indiana*, 452 U.S. 314 (1981), *United States* v. *Lopez*, 514 U.S. 549 (1996) and *United States* v. *Morrison*, 529 U.S. 598 (2000), as severely constraining Congress's Commerce Clause power. The Washington Supreme Court has asserted that these cases

direct lower courts to examine the individual components of complex statutory schemes that relate to interstate economic activity and to invalidate any specific statutory provision of the scheme that in its judgment does not directly advance a legitimate Commerce Clause goal. If allowed to stand, the Commerce Clause analysis of the Washington Supreme Court could potentially prevent Congress from responding in a comprehensive way to matters affecting the national economy. This Court should correct the state court's undue narrowing of congressional power.

This Court has recently reaffirmed that the Commerce Clause authorizes Congress to "'regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.'" *Morrison*, 529 U.S. at 609. Further, this Court has recognized that Congress may "'regulate those activities having a substantial relation to interstate commerce.'" *Id.* Congress has specifically concluded that the inadequacies of the highway system have an impact on interstate commerce. 23 U.S.C. § 101(b).

In *Hodel*, the Court described how courts should assess Commerce Clause challenges to particular components of far-reaching regulatory schemes. The district court in *Hodel* had concluded that 15 different provisions of the Surface Mining and Reclamation Control Act of 1977 could have been justified as Commerce Clause legislation only with respect to how they helped reduce air and water pollution. 452 U.S. at 322-23. The party challenging the Act argued that several of these provisions do not contribute to either of these ends. *Id.* at 329 n.17. The Court rejected the claim:

> A complex regulatory program ... can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of a regulatory program and that the regulatory scheme when considered as a whole satisfies this test.

Id.

Following *Hodel*, court review should focus on the scheme as a whole. The general orientation is one of deference to Congress's chosen methods to respond comprehensively to matters affecting the national economy. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 261-62 (1964) (the structure of a federal regulatory scheme that is, as a general matter, constitutional "is within the sound and exclusive discretion of Congress"). The Washington Supreme Court correctly recognized that the federal highway safety programs themselves clearly contain "a sufficient nexus" to interstate commerce to "justify the 'regulatory scheme when considered as a whole.'" *Guillen*, 31 P.3d at 654. Following *Hodel* and *Heart of Atlanta Motel*, the court should then have deferred to Congress's chosen method of achieving its legitimate objective.

Instead, the Washington Supreme Court took a novel turn. It seized on the language in *Hodel* indicating that the various components of a regulatory program must all be "integral" to the program's operation to authorize aggressive judicial review of Congress's chosen means to achieve its legitimate ends. It claimed that this Court's recent decisions in *Lopez* and *Morrison* supported its novel reading of *Hodel* because in those decisions this Court had "eroded" the "precedential authority" that would require courts to defer to Congress on matters affecting state sovereignty. *Id.* at 653.

As noted above, the court ultimately concluded that § 409 was not an "integral part" of the federal highway safety programs because the court could not "see how [any] federal purposes are reasonably served by also barring the discovery and admissibility in state court of routinely prepared state and local traffic and accident materials and data that would exist even had a federal safety enhancement program never been

created." *Id.* at 654. Put another way, the court interpreted the "integral part" language in *Hodel* to require lower courts to examine whether any challenged component of a federal regulatory program itself independently and directly serves a valid Commerce Clause purpose. *Hodel* was thus read to contradict itself.

No other court has read *Morrison* and *Lopez* to alter the rule of *Hodel* and *Heart of Atlanta Motel* so fundamentally. To the contrary, the Fourth Circuit has specifically rejected such a reading. The Fourth Circuit was asked to invalidate a regulation promulgated pursuant to the Endangered Species Act, because the particular regulation did not itself substantially affect interstate commerce. The court explained that "given that Congress has the ability to enact a broad scheme for the conservation of endangered species, it is not for the courts to invalidate individual regulations." *Gibbs* v. *Babbitt*, 214 F.3d 483, 498 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

The Fourth Circuit's analysis is fully consistent with this Court's approach in *Morrison* and *Lopez*. *Morrison* left no doubt that Congress's power under the Commerce Clause is strongest when Congress is regulating economic activity; Congress's claim to authority is weaker when it attempts to regulate intrastate violent conduct. *Morrison*, 529 U.S. at 610. And *Lopez* reaffirmed that courts should uphold "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." 514 U.S. at 561. Far from cutting back on *Hodel*'s crucial holding, *Lopez* and *Morrison* both fully support the continued vitality of analyzing a regulatory scheme as a whole, not piecemeal.

Under a properly deferential standard, the 1995 amendment to § 409 is constitutional. It is sufficiently connected to Congress's effort to promote highway safety, and thereby protect the channels of interstate commerce, to satisfy the "integral part" standard of *Hodel*. Congress may ensure that

public and private officials are not deterred from providing the most thorough collection and analysis of safety related data. *Robertson*, 954 F.2d at 1435. *City of Atlanta* v. *Watson*, 475 S.E.2d 896, 903 (Ga. 1996) (federal provision privileging noise exposure maps created in compliance with federal Noise Abatement Act is "integral part" of federal program). Section 409 survives even if, as the Washington Supreme Court held, it reaches documents that were originally created and retained for reasons other than the need to comply with federal law. Congress may well have concluded that once a document is gathered into a federally mandated collection, it would make little sense to undermine the privilege by allowing the plaintiff to access the document through other means. Cf. *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 154-55 (1989) (holding that FOIA exemption for documents "compiled for law enforcement purposes" includes documents originally created for another purpose but which the government later compiled for law enforcement purposes, and thus prevents disclosure even by the separate government department that originally created it). Congress was interested in privileging certain *information* that can help promote public safety, not just particular *documents* in particular locations.

Section 409 is a legitimate exercise of Congress's Commerce Clause authority because it is an "integral part"—a part that reasonably (even if indirectly) promotes the ultimate aim—of a lawfully enacted regulatory scheme. This Court should clarify that Congress retains the power, under the Commerce Clause, to use whatever reasonable means it deems proper to accomplish its legitimate ends.

CONCLUSION

The petition should be granted.

Respectfully submitted,

LOUIS P. WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
Law Department
50 F Street, N.W.
Washington, D.C. 20001-1564
(202) 639-2505

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ROBERT N. HOCHMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for the Association of American Railroads

* Counsel of Record

March 27, 2002

Supreme Court, U.S.
FILED
MAR 27 2002
OFFICE OF THE CLERK

(8)

NO. 01-1229

IN THE
SUPREME COURT OF THE UNITED STATES

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, AS LEGAL GUARDIAN FOR JENNIFER GUILLEN AND ALMA GUILLEN, MINORS; AND MARIANO GUILLEN, AS LEGAL GUARDIAN FOR PAULINA GUILLEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

AMICUS BRIEF OF THE STATES OF ALASKA, FLORIDA, HAWAII, INDIANA, OHIO, OREGON, NEBRASKA, NEVADA, VERMONT, WASHINGTON, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

CHRISTINE O. GREGOIRE
Attorney General
WILLIAM BERGGREN COLLINS*
MICHAEL E. TARDIF
Sr. Assistant Attorneys General
1125 Washington Street SE
P.O. Box 40126
Olympia, WA 98504-0126
(360) 459-6600
**Counsel of Record for Amicus Curiae*
Additional Counsel Listed inside

15?

Bruce M. Botelho
Attorney General of Alaska
123 4th Street
PO Box 110300
Juneau, Alaska 99811

Robert A. Butterworth
Attorney General of Florida
The Capitol PL-01
Tallahassee, Florida 32399-1050

Earl I. Anzai
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

Steve Carter
Attorney General of Indiana
Government Center 4th Floor
402 W Washington Street
Indianapolis, Indiana 46204

Don Stenberg
Attorney General of Nebraska
Department of Justice
PO Box 98920
Lincoln, Nebraska 68509

Frankie Sue Del Papa
Attorney General of Nevada
100 N Carson Street
Carson City, Nevada 89701

Betty D. Montgomery
Attorney General of Ohio
30 East Broad Street
Columbus, Ohio 43266

Hardy Myers
Attorney General of Oregon
1162 Court Street NE
Salem, Oregon 97310

William H. Sorrell
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609-1001

Darrell V. McGraw, Jr.
Attorney General of West Virginia
State Capitol Room 26-E
1900 Kanawha Boulevard E
Charleston, West Virginia 25305

TABLE OF CONTENTS

INTEREST OF AMICI.....1

REASONS FOR GRANTING THE PETITION.....1

1. The Federal Aid Highway Act Created A Successful Program To Provide Funding To States For Safety-Related Capital Improvements To Older Highways.....1

2. The Funding And Prioritization Of The Federal Aid Improvement Projects Require The State To Collect A Large Amount Of Safety Data With Concomitant Potential For Tort Litigation Against The States 3

3. Federal Law Facilitates The Record Keeping And State Participation Needed To Sustain The Federal Safety Program By Protecting States From The Use Of Federal Safety Data In Tort Litigation.....5

4. The Washington State Supreme Court Decision Substantially Interferes With State And Federal Interests In Highway Safety And Should Be Reversed.....6

CONCLUSION.....9

TABLE OF AUTHORITIES

Cases

Bird v. Walton
848 P.2d 1298 (Wash. App. 1993) 4

City of Atlanta v. Watson
475 S.E.2d 896 (Ga. 1996) 6

Claspill v. Missouri Pac. R.R. Co.
793 S.W.2d 139 (Mo. en banc 1990) 6

Dep't of Transp. v. Solano County Superior Ct.
47 Cal. App. 4th 852, 55 Cal. Rptr. 2d 2 (1996) 6

Guillen v. Pierce County
31 P.3d 628 (Wash. 2001) 8

Harrison v. Burlington Northern R.R. Co.
965 F.2d 155 (7th Cir. 1992) 6

Kitt v. Yakima County
611 P.2d 1234 (Wash. 1980) 4

Martinolich v. Southern Pac. Transp. Co.
532 So. 2d 435 (La. App. 1988) 6, 7

Palacios v. Louisiana & Delta R.R. Inc.
740 So. 2d 95 (La. 1995) 6

Reichert v. Dep't of Transp. & Devel.
694 So. 2d 193 (La. 1997) 8

Sawyer v. Illinois Cent. Gulf R.R. Co.
606 So. 2d 1069 (Miss. 1992) 6

Southern Pac. Transp. Co. v. Yarnell
863 P.2d 271 (Ariz. 1993) 6

Stewart v. Washington
597 P.2d 101 (Wash. 1979) 4

Wiedeman v. Dixie Elec. Membership Corp.
627 So. 2d 170 (La. 1993) 6, 7

Statutes

23 U.S.C. § 101, *et seq.* 1

23 U.S.C. § 130 2

23 U.S.C. § 130(d) 3

23 U.S.C. § 144 2

23 U.S.C. § 144(b) 3

23 U.S.C. § 152 ..... 1, 2, 5

23 U.S.C. § 152(a) 3

23 U.S.C. § 402(a) 1

23 U.S.C. § 402(k) 4

23 U.S.C. § 409 ..... passim

Pub. L. No. 102-240, Title I, Part A,
§ 1035(a), 105 Stat. 1978 (1991) 7

Pub. L. No. 104-59, Title III,
§ 323, 109 Stat. 591 (1995) 8

2000 Wash. Laws ch. 217, 219, 221, 222, 223, 226, 232 2

Wash. Rev. Code §§ 47.04.050-.070 2

Cal. Gov't Code § 830.6 4

Regulations

23 C.F.R. § 924.9 ..... 3, 4

Other Authorities

U.S. Dep't of Transp., Fed. Highway Admin.,
1996 Annual Report on Highway Safety Improvement Programs, Pub. No. FHWA-SA-96-040 (Apr. 1996) 3

Treatises

W. Page Keeton et al.,
Prosser and Keeton on the Law of Torts (5th ed. 1984) 8

INTEREST OF AMICI

This brief is being filed under Rule 37(4), permitting amicus curiae briefs by states without the need for consent of the parties or leave of the Court.

Washington and the other amici states all operate extensive highway facilities and receive substantial federal funding to make safety improvements to these facilities. *See* 23 U.S.C. § 152. Federal law requires amici to compile and maintain extensive records of vehicle accidents and other data to support their applications for federal funding. 23 U.S.C. §§ 402(a), 152. Federal law also protects amici from use of these federally-required data collections as evidence that a highway was defective and that the state had notice of the defect. 23 U.S.C. § 409.

The decision of the Washington State Supreme Court declares part of 23 U.S.C. § 409 unconstitutional, removing liability protection afforded to states who participate fully in an essential federal safety program. The states have a strong interest in supporting a federal statute that protects their ability to participate in a federal program which serves important state and federal interests.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve a conflict that involves a vital federal-state program to increase highway safety.

1. The Federal Aid Highway Act Created A Successful Program To Provide Funding To States For Safety-Related Capital Improvements To Older Highways

All states receive substantial funding from the United States under the Federal Aid Highway Act (the Act or the Highway Act), 23 U.S.C. § 101, *et seq*. States assent "to the

purposes, provisions, terms, and conditions of the grant of money provided" by legislation and by accepting and expending federal funds provided under the Act. *See* Wash. Rev. Code §§ 47.04.050-.070. The large size and importance of this program is shown by the size of the appropriations. For the 1999-2001 biennium, Washington State alone anticipated receiving almost $700 million in federal funding, approximately 45 percent of its entire highway budget. 2000 Wash. Laws ch. 217, 219, 221, 222, 223, 226, 232.

The Highway Act also provides specific funding for safety improvements to older highways. The Act contains a broad "hazard" elimination program which provides funding for states to improve "hazardous locations, sections, and elements" that might be a "danger to motorists, bicyclists, and pedestrians". 23 U.S.C. § 152. The Act also contains sections providing funding for improvements to unsafe bridges and hazardous railway-highway crossings. 23 U.S.C. §§ 130, 144. The federal-state partnership in the highway safety program has produced substantial injury and accident reductions in locations where capital improvements have been funded. The 1996 Report of the Secretary of Transportation to Congress summarized the reductions as follows:

> **"Effectiveness of the Rail-Highway Crossings Program**
>
> "The **Rail-Highway Crossings** Program continues to show the greatest percentage of accident rate reductions. Fatal, nonfatal-injury, and combined fatal-plus-nonfatal-injury accident rates have been reduced by 87, 64, and 68 percent, respectively. . . . Based on evaluations of improvements provided by the states, the **Rail-Highway Crossings** Program has helped to prevent more than 8,500 fatalities and 38,900 nonfatal injuries since 1974.

> **"Effectiveness of the Hazard Elimination program**
>
> "The Hazard Elimination Program has provided substantial reductions in accident rates, particularly fatal accidents. Fatal, nonfatal-injury, and combined fatal-plus-nonfatal-injury accident rates have been reduced by 51, 27, and 27 percent, respectively. . . . Evaluations of improvements made under the **Hazard Elimination** Program indicate that the program has helped to prevent more than 26,500 deaths and 760,000 nonfatal injuries since 1974."[1]

A major part of the hazard elimination program has consisted of improving, installing, and upgrading traffic signals.[2]

2. The Funding And Prioritization Of The Federal Aid Improvement Projects Require The State To Collect A Large Amount Of Safety Data With Concomitant Potential For Tort Litigation Against The States

The safety improvement provisions of the Highway Act require state governments to perform engineering surveys and compile extensive data to support requests for funding. 23 U.S.C. §§ 152(a), 144(b), 130(d). A prominent part of the data that is used to analyze and prioritize safety improvement projects is records of vehicle accidents. The implementing regulations for the safety improvement program specifically require a state process for collecting, maintaining, and analyzing accident data for "hazardous" locations, sections, and elements. Section 924.9 of Title 23 of the Code of Federal Regulations provides, in part:

> "(a) The planning component of the highway safety improvement program shall incorporate:

---

[1] U.S. Dep't of Transp., Fed. Highway Admin., *1996 Annual Report on Highway Safety Improvement Programs, Pub. No. FHWA-SA-96-040*, at IV-5 (Apr. 1996). This was the last annual report.

[2] *Id.* at IV-3.

"(1) A process for collecting and maintaining a record of accident, traffic, and highway data, including, for railroad-highway grade crossings, the characteristics of both highway and train traffic;

"(2) A process for analyzing available data to identify highway locations, sections and elements determined to be hazardous on the basis of accident experience or accident potential[.]" 23 C.F.R. § 924.9.

Moreover, the Secretary of Transportation is required to make grants to states to establish and maintain "comprehensive computerized safety record keeping system[s] designed to correlate data regarding traffic accidents, drivers, motor vehicles, and roadways". 23 U.S.C. § 402(k).

The engineering studies and compilations of data regarding highway "safety" and "hazards" likely will expand the bases for tort liability for the states. Traditional tort liability for highways lies in the area of signing and maintenance. Under state tort law, highway authorities can be liable if they do not properly apply the uniform signing manual or fail to repair a broken highway element after notice of the defect. *See Kitt v. Yakima County*, 611 P.2d 1234 (Wash. 1980); *Bird v. Walton*, 848 P.2d 1298 (Wash. App. 1993). There can also be liability for improper design of new facilities, although some states and courts limit the liability because design is discretionary or governmental. *See Stewart v. Washington*, 597 P.2d 101 (Wash. 1979) (liability for lack of lighting on new bridge); Cal. Gov't Code § 830.6 (immunity for design). Thus, traditional highway tort liability arises largely from alleged failures to conform to established engineering standards (signing and design) or to repair existing highway features which have fallen into disrepair (maintenance).

The data compilation and engineering analyses required by the federal safety improvement program foster a new kind of tort litigation against highway authorities. In these cases, the claim is generally not that the highway was improperly designed, signed, or maintained. The claim is that the engineering analyses and compilation of accident and other data establish that the highway was unsafe and hazardous, and that the highway authority had notice of this "defect" and failed to make capital improvements to "repair" it. The Guillen lawsuit is typical of these lawsuits. The complaint concerns an intersection controlled by stop signs rather than modern traffic signals. The evidence which plaintiffs seek from Pierce County to support liability are the accident reports that were collected and the engineering studies that were written by the county to support its application for funds under § 152 to make capital improvements to the intersection by adding traffic signals.

The safety data collected by highway authorities in an effort to obtain safety improvement funding from the federal highway program provides the basis for claims that state highway authorities have tort liability for not making the capital improvements sooner. Elimination of the protection provided by 23 U.S.C. § 409 inhibits full state participation in the Highway Act program and interferes with both state and federal interests of improving highway safety.

3. Federal Law Facilitates The Record Keeping And State Participation Needed To Sustain The Federal Safety Program By Protecting States From The Use Of Federal Safety Data In Tort Litigation

Federal law provides the data compiled pursuant to the Highway Act, 23 U.S.C. § 409 is not subject to discovery or admission into evidence in state or federal court proceedings or actions for damages occurring at locations mentioned or addressed by the data. The purpose of the statute is to facilitate candor in the administration of the

safety improvement program by preventing the use of data developed for the federal safety program as a tool in private litigation. *Harrison v. Burlington Northern R.R. Co.*, 965 F.2d 155 (7th Cir. 1992).

Section 409 protects the states from having litigation by private parties deter states from collecting and compiling the accident reports and other highway safety data which the federal hazard elimination program requires to evaluate and prioritize the highway safety improvement projects competing for funding. *See Palacios v. Louisiana & Delta R.R. Inc.*, 740 So. 2d 95, 98 n.6 (La. 1995). Ultimately, § 409 protects the federal government from the uncertain impact of state tort liability which would discourage the record keeping and state participation needed to sustain the federal safety improvement program.

4. The Washington State Supreme Court Decision Substantially Interferes With State And Federal Interests In Highway Safety And Should Be Reversed

The intervention of this Court is necessary to resolve the conflict between *Guillen* and other courts that have considered the issue. All of the courts which have considered the constitutionality of 23 U.S.C. § 409 have upheld its constitutionality.[3] Several courts have also determined that § 409 pre-empts state law under the Supremacy Clause.[4] However, many states have not

[3] *Claspill v. Missouri Pac. R.R. Co.*, 793 S.W.2d 139 (Mo. en banc 1990); *Martinolich v. Southern Pac. Transp. Co.*, 532 So. 2d 435 (La. App. 1988); *Southern Pac. Transp. Co. v. Yarnell*, 863 P.2d 271 (Ariz. 1993).

[4] *City of Atlanta v. Watson*, 475 S.E.2d 896 (Ga. 1996); *Dep't of Transp. v. Solano County Superior Ct.*, 47 Cal. App. 4th 852, 55 Cal. Rptr. 2d 2 (1996); *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So. 2d 170 (La. 1993); *Sawyer v. Illinois Cent. Gulf R.R. Co.*, 606 So. 2d 1069 (Miss. 1992).

addressed this issue and there are no federal appellate decisions on the subject.

The volume of reported decisions nationwide concerning the § 409 privilege, during the relatively brief period since its original enactment in 1987, provides an indication of the importance of the protections of the statute. There are already well over 100 reported decisions in state and federal courts in 25 different jurisdictions. This is essentially a statute creating an evidentiary privilege. A statute governing evidence would not usually produce a large volume of appellate decisions in a short time period. Section 409 has produced a large number of appellate decisions because the highway safety data created to implement the Federal Highway Act has spawned a kind of tort litigation against states that is enabled almost solely by this data. Such litigation is difficult to sustain without the data collected to implement the federal highway safety program.

The importance of § 409 to the federal scheme is also indicated by the attention given to the statute by Congress. Section 409 has been amended twice to increase the privilege for highway safety data. A 1991 amendment added protection of the data from pre-trial discovery. Pub. L. No. 102-240, Title I, Part A, § 1035(a), 105 Stat. 1978 (1991). This was an apparent reaction to cases holding that the original 1987 statute prohibited use of the data at trial, but did not prohibit discovery of the data. *See Martinolich v. Southern Pac. Transp. Co.*, 532 So. 2d 435 (La. App. 1988).

Congress made a more significant amendment in 1995. A 1993 Louisiana decision had held that 23 U.S.C. § 409 protected actual "data compilations", but did not protect from discovery the "raw data" which had been collected by highway authorities to support their applications for federal safety funding. *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So. 2d 170 (La. 1993). Congress reacted to this decision by adding the words "or collected" to § 409, which had the effect of making the raw safety data,

such as the accident reports in this lawsuit, nondiscoverable and inadmissible. *Reichert v. Dep't of Transp. & Devel.*, 694 So. 2d 193 (La. 1997); Pub. L. No. 104-59, Title III, § 323, 109 Stat. 591 (1995).

The problem created by the Washington Supreme Court decision is more significant because its holding is based on the 1995 amendment to § 409. The Washington Supreme Court held that the congressional intent to protect accident reports and other "raw data" collected by highway authorities served no "vital federal purpose" and could not "reasonably be characterized as an 'integral part' of the Federal-aid highway system's regulation". *Guillen v. Pierce County*, 31 P.3d 628, 654 (Wash. 2001). This holding is in error. As elucidated in the concurring opinion, which is more in the nature of a dissent on this point, the majority's conclusion ignores the evidentiary use of the "collection" of data undertaken because of the federal program. *Id.* at 656-59. The concurring justices correctly emphasized that it was the collection of this data by state highway authorities that provided the enhanced evidence to establish liability, Thus, the federally required collection of data could be protected by federal law without violating the constitution. *Id.* at 658-59.

The need for this Court to resolve this conflict is bolstered by modern trends in governmental liability. Governmental immunities have been eliminated or constrained in recent decades (W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 131, at 1055-56 (5th ed. 1984), and tort litigation against highway authorities has become commonplace. Thus, the protections afforded by § 409 to the federal-state highway safety program will continue to increase in importance. A definitive decision by the United States Supreme Court on the constitutionality of § 409 is needed.

CONCLUSION

The decision of the Washington State Supreme Court is harmful to state and federal interests in making safety improvements to existing highway facilities. The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED

CHRISTINE O. GREGOIRE
Attorney General

WILLIAM BERGGREN COLLINS*
MICHAEL E. TARDIF
Sr. Assistant Attorneys General

1125 Washington Street SE
P.O. Box 40126
Olympia, WA 98504-0126
(360) 459-6600
**Counsel of Record for Amicus Curiae*

March 26, 2002

(12)

Supreme Court, U.S.
FILED

JUL 3 2002

OFFICE OF THE CLERK

No. 01-1229

IN THE

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULA GUILLEN and FATIMA GUILLEN,

Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

LOUIS P. WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
Law Department
50 F Street, N.W.
Washington, D.C. 20001-1564
(202) 639-2505

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ROBERT N. HOCHMAN
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for the Association of American Railroads

* Counsel of Record

July 3, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

37 pp

QUESTION PRESENTED

Whether 23 U.S.C. § 409, which protects specified information "compiled or collected" in connection with certain federal highway safety programs from being subject to discovery, admitted into evidence, or being considered for any other purpose in any federal or state action for damages, is a valid exercise of Congress' power pursuant to the Spending Clause, the Commerce Clause or the Necessary and Proper Clause of the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
STATUTORY BACKGROUND	3
SUMMARY OF ARGUMENT	9
ARGUMENT	13
I. SECTION 409 IS A VALID EXERCISE OF CONGRESS' ARTICLE I, SECTION 8 POWERS	13
II. SECTION 409 DOES NOT OFFEND PRINCIPLES OF STATE SOVEREIGNTY	25
III. THIS COURT SHOULD GIVE SECTION 409 A NATURAL CONSTRUCTION SUFFICIENT TO ACCOMPLISH ITS PURPOSES	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES — Page

Alden v. *Maine*, 527 U.S. 706 (1999) 25, 27
Barnes v. *Gorman*, 122 S. Ct. 2097 (2002) 19
Carson v. *Roane-Anderson Co.*, 342 U.S. 232 (1952) 15
City of Atlanta v. *Watson*, 475 S.E.2d 896 (Ga. 1996) 25
Coniker v. *State*, 695 N.Y.S.2d 492 (N.Y. Ct. Cl. 1999) 8
FERC v. *Mississippi*, 456 U.S. 742 (1982) 14, 23
Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) 27
Geier v. *American Honda Motor Co.*, 529 U.S. 861 (2000) 14
Greenwood v. *United States*, 350 U.S. 366 (1956) 15
Guillen v. Pierce County, 31 P.3d 628 (Wash. 2001) ..... *passim*
Hanna v. *Plumer*, 380 U.S. 460 (1965) 15
Harrison v. *Burlington N. R.R.*, 965 F.2d 155 (7th Cir. 1992) 17
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 23
Hodel v. *Indiana*, 452 U.S. 314 (1981) 21, 22
John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989) 27, 28
Jones v. *United States*, 526 U.S. 227 (1999) 28
Legal Tender Case, 110 U.S. 421 (1884) 17
Light v. *State*, 560 N.Y.S.2d 962 (N.Y. Ct. Cl. 1990) 8, 17
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 15, 17, 27
New York v. *United States*, 505 U.S. 144 (1992) .. 19, 26
Norfolk S. Ry. v. *Shanklin*, 529 U.S. 344 (2000) 14
Perez v. *United States*, 402 U.S. 146 (1971) 24

TABLE OF AUTHORITIES—continued

Page

Printz v. *United States*, 521 U.S. 898 (1997) 26
Public Utils. Comm'n v. *United States*, 355 U.S. 534 (1958) 27
Reichert v. *State, Dep't of Transp. & Dev.*, 694 So. 2d 193 (La. 1997) 17
Reno v. *Condon*, 528 U.S. 141 (2000) 27
Robertson v. *Union Pac. R.R.*, 954 F.2d 1433 (8th Cir. 1992) 17
Salinas v. *United States*, 522 U.S. 52 (1997) .. 10, 16, 17
South Dakota v. *Dole*, 483 U.S. 203 (1987) 13, 18, 19, 20
Southern Pac. Transp. Co. v. *Yarnell*, 890 P.2d 611 (Ariz. 1995) 8
Testa v. *Katt*, 330 U.S. 386 (1947) 27
United States v. *Darby*, 312 U.S. 100 (1941) 21
United States v. *Lopez*, 514 U.S. 549 (1995) 21, 24
United States v. *Morrison*, 529 U.S. 598 (2000) 21, 22, 24
Wiedeman v. *Dixie Elec. Membership Corp.*, 627 So. 2d 170 (La. 1993) 8
Willy v. *Coastal Corp.*, 503 U.S. 131 (1992) 15

CONSTITUTION, STATUTES AND REGULATIONS

U.S. Const. art. I, § 8, cl. 18 18
The Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 4
Federal-Aid Highway Act of 1970, Pub. L. No. 91-605, 84 Stat. 1713 5
18 U.S.C. § 285 16
§ 286 16
§ 287 16
§ 666 16
23 U.S.C. § 101(b) 22
§ 130 ..... 2, 3, 4, 5

TABLE OF AUTHORITIES—continued

	Page
23 U.S.C. § 144	3, 5, 6
§ 152	3, 5, 6
§ 409	2, 3, 5, 16, 20
28 U.S.C. § 2072	15
49 U.S.C. § 504(f)	27
§ 20901(a)	7
§ 20903	27
§ 47507	27
23 C.F.R. § 924.9(a)(1)	5, 9
§ 924.9-.11	6
§ 924.13(a)(2)	6, 9
§ 924.15	9
Wash. Admin. Code § 136-28-010	30
§ 136-28-030	30

LEGISLATIVE HISTORY

H.R. Rep. No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859	3, 4
H.R. Rep. No. 104-246 (1995), *reprinted in* 1995 U.S.C.C.A.N. 522	9, 27
H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679	8
S. Rep. No. 89-1302 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2741	4, 22

OTHER AUTHORITIES

Federal Highway Admin., U.S. Dep't of Transp., *Allocation of Federal Funds Administered by Federal Highway Administration for Fiscal Year 2000*, *at* http://www.fhwa.dot.gov/ohim/hs00/fa4d.htm (visited June 19, 2002))	18
Federal Highway Admin., U.S. Dep't of Transp., *Railroad-Highway Crossing Handbook* (1986)	6

TABLE OF AUTHORITIES—continued

	Page
Federal R.R. & Highway Admins., U.S. Dep't of Transp., *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* (1972)	4
U.S. Dep't of Transp., Forms FRA F6180.57 and FRA F6180.71, *available at* http://safetydata.fra.dot.gov/OfficeofSafety/Default.asp (visited June 19, 2002)	7
U.S. Dep't of Transp., *Highway-Railway Crossing FRA Safety Quick Statistics*, *at* http://safetydata.fra.dot.gov/ OfficeofSafety/ Default.asp?page=stats.asp (visited June 19, 2002)	3
U.S. Dep't of Transp., *National Railroad-Highway Crossing Inventory Update Manual* (1976)	2, 6, 7
U.S. Gov't Accounting Office, *Report to Congressional Requesters, Railroad Safety: Status of Efforts to Improve Railroad Crossing Safety* (Aug. 1995)	3, 4, 5

IN THE

Supreme Court of the United States

No. 01-1229

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULA GUILLEN and FATIMA GUILLEN,

Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Association of American Railroads ("AAR") is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In

---

[1] The parties have consented to the filing of this brief, and written letters of consent have been filed with the Court. No counsel of a party has authored this brief in whole or part, and no person or entity, other than *amicus curiae* or its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry.

Vigorous enforcement of 23 U.S.C. § 409 is a matter of substantial concern to railroads because it plays an important role in the federal government's effort to promote railroad crossing safety. Section 409 specifically exempts from discovery or admission into evidence certain information "compiled or collected for the purpose of" promoting railway-highway crossing safety pursuant to 23 U.S.C. § 130 ("Section 130 program"). Section 130 makes federal funds available for use in improving safety at railway-highway crossings. Congress chose to exempt this information from use in civil litigation to ensure that the program most effectively promotes safety. To deny § 409 its full effect adversely affects railroads in two ways. First, by increasing the cost to States and railroads of collecting and compiling this critical safety-related information, the Washington Supreme Court undermines the efficacy of the programs directed towards improving rail safety. Second, contrary to Congress' intent, railroads are exposed to damages based on information that the railroads themselves collect and submit to state agencies (and the Federal Railroad Administration) for compilation in an effort to promote highway safety under the Section 130 program.[2]

---

[2] The National Rail-Highway Grade Crossing Inventory was begun by the Department of Transportation (through the Federal Railroad Administration) in conjunction with AAR in the early 1970s. Every railroad grade crossing, public and private, was identified, numbered, and more than 40 items of information were initially collected on a USDOT-AAR form for each crossing. Under the U.S. Dep't of Transp., *National Railroad-Highway Crossing Inventory Update Manual* (1976) ("Update Manual"), updating is required for the data in each specific inventory category, some by the state agency and some by the railroad, on a rational source basis. *See, id.* tbl.1, at C-3. For example, railroads are required to update changes in train speed, number of tracks, and train movements per day, while states are required to update changes in the type of land and/or development near the crossing, and changes in the average number of vehicles and percentage of trucks per day. Typically, State collections include this information, accident history, and other records, including correspondence inspection records and hazard ratings, as well as other information deemed necessary for decision making.

STATUTORY BACKGROUND

The statute under review, 23 U.S.C. § 409, is a crucial component of three distinct federal highway safety programs: The Railway-Highway Crossing Program (§ 130), The Highway Bridge Replacement Program (§ 144), and The Hazard Elimination Program (§ 152). These programs were created by federal highway legislation that displaced a traditionally political process for identifying and funding highway projects with a new, data-driven, administrative model for prioritizing highway safety projects.

These federal highway safety programs have had a substantial impact on public safety and have promoted commerce throughout the nation for 30 years. Developed in the 1970s in response to an "escalating tide of mayhem on our highways," these safety programs were designed to reduce the distressing losses in lives and money that plagued our highway system. H.R. Rep. No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1888-89 (noting that in 1972 the nation lost over $40 billion and 56,000 lives, and more than 4 million persons were injured.) With respect to the issue of particular concern to *amicus*, railway-highway crossings, the results have been dramatic. In the late 1970s, there were an average of 864 fatalities and 11,516 accidents per year. U.S. Gov't Accounting Office, *Report to Congressional Requesters, Railroad Safety: Status of Efforts to Improve Railroad Crossing Safety* 18 (Aug. 1995) ("GAO Report"). By the year 2001, despite an increase in traffic, fatalities were reduced by more than one-half and accidents by more than two-thirds. U.S. Dep't of Transp., *Highway-Railway Crossing FRA Safety Quick Statistics*, *at* http://safetydata.fra.dot.gov/

OfficeofSafety/Default.asp?page=stats.asp (visited June 19, 2002). The federal government estimates that the Railway-Highway Crossing Program, codified at 23 U.S.C. § 130 ("the Section 130 program") had, by May 1994, "prevented more than 7,600 fatalities and 33,500 nonfatal injuries." GAO Report, at 18.

These stunning results are the product of a deliberately cooperative approach among public and private entities concerned about public safety. The Secretary of Transportation in 1972 concluded that an effective effort to improve railroad crossing safety would require "national coordination." Federal R.R. & Highway Admins., U.S. Dep't of Transp., *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* iii (1972). Congress agreed, noting "the necessity for improved coordination and cooperation on a program and project level between Federal, State and local authorities, and between the public and private sectors"; only such a coordinated approach could provide the "multi-pronged attack on those highway-related factors which contribute most to accidents." H.R. Rep. No. 93-118, *reprinted in* 1973 U.S.C.C.A.N. at 1889.

Congress began its effort to coordinate the highway safety efforts of federal, state and local officials in 1966. The Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731, directed federal officials

> "to encourage and assist each of the States in the establishment of a highway safety program based on a comprehensive statewide plan ... which ... shall include ... provisions for an effective accident record system ... and surveillance of traffic for detection and correction of high or potentially high accident locations."

S. Rep. No. 89-1302 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2741, 2741. Congress extended its effort to change the way the nation responded to the problem of highway safety with

the Federal-Aid Highway Act of 1970. In that legislation, Congress mandated that any State participating in the federal highway program establish "a State agency which shall have adequate powers, and be suitably equipped and organized to carry out" the program. Pub L. No. 91-605, § 203(a), 84 Stat. 1713, 1741 (1970) (amending 23 U.S.C. § 402(b)(1)(A)). At that time, Congress established the first of the three programs specifically referenced in 23 U.S.C. § 409: The Highway Bridge Replacement Program. Codified at 23 U.S.C. § 144, the program called for the States and the federal government to "inventory all bridges located on any of the Federal-aid systems ...[, to] classify them according to their serviceability, safety, and essentiality for public use; and ... based on that classification, assign each a priority for replacement." Pub. L. No. 91-605, § 204(a), 84 Stat. at 1742.

Congress thus established a three-step procedure for "targeting" federal funds "to the greatest need." GAO Report at 4. First, identify all relevant highway locations. Second, prioritize individual locations in terms of public importance and safety risks presented. Third, direct funds to those locations that promise the greatest public safety return on the public's investment. This model was carried forward into the Railway-Highway Crossing Program, 23 U.S.C. § 130(d) (requiring the States to "systematically maintain a survey of all highways to identify those railroad crossings which may require [attention] and establish and implement a schedule of projects for this purpose"), and the Hazard Elimination Program, *id.* § 152(a) (requiring the systematic gathering of data and prioritizing of safety-related projects).

To succeed, however, this model requires the sustained effort of State and industry officials. The crucial data-gathering function falls principally on the States. For example, the regulations enacted pursuant to § 130 require the States, *inter alia*, to "collect[] and maintain[]" the relevant crossing traffic and safety data at crossings, 23 C.F.R. § 924.9(a)(1), and to create a "record of accident experience

before and after the implementation of a highway safety improvement project," *id.* § 924.13(a)(2).[3] The § 152 program also places primary data-gathering responsibilities on the States, 23 U.S.C. § 152(a), while the § 144 program requires the Secretary of Transportation, working with the States, to gather the relevant information related to bridges, *id.* § 144(b)-(c).

Private entities (especially ra play a crucial role in the Section 130 Progra Department of Transportation has recognized that while "local, State, and Federal agencies have collected and maintained information about railroad-highway crossings, most crossing information systems [had in 1976] been fragmented and incomplete." Update Manual at B-1. Because railroad crossing safety data "can continue to be useful only if maintained and updated" as incidents occur, *id.* at A-1, the Department of Transportation solicited and received the cooperation of the railroad industry in the data-gathering endeavor. The railroads and the government, for example, equally shared the cost of developing a "'Comprehensive National Railroad-Highway Crossing Information and Numbering System.'" *Id.* at B-1. The Update Manual establishes procedures that are "designed to ensure availability and use of an up-to-date railroad-crossing data base and to ensure continued use of the channels of communication [between various public and industry entities] established during the initial inventory," and

[3] Central to the overwhelming success of the Section 130 program is its regulatory scheme of ensuring that the most dangerous grade crossings are updated first, by requiring that the States prioritize grade crossing improvement projects using relative hazard rankings required by 23 C.F.R. §§ 924.9-.11; Federal Highway Admin., U.S. Dep't of Transp., *Railroad-Highway Crossing Handbook* § III (1986) ("Assessment of Crossing Safety and Operation") (discussing approved mathematical formulae dependent on the update information). This is why it is imperative that comprehensive information relevant to the safety of each crossing be supplied by all participants in an uninhibited way.

allocates specific data collection and updating tasks to the States and to the railroads. *Id.* at C-1, C-3 & tbl.1. Finally, federal law requires the railroads to report all accidents on railway-highway crossings to the Department of Transportation. 49 U.S.C. § 20901(a).[4]

Congress has determined that the continuing effectiveness of the federal highway safety programs is undermined by tort litigation. As discussed above, the programs depend for their success on comprehensive data-gathering and analysis. But, because resources are limited, not all sites are deemed of sufficient priority to receive funds for improvement immediately; this is a long-term effort in which even known, risky situations must be left unaddressed for periods of time so that adequate resources would be available for the locations posing the greatest dangers to life and health. The result, as the Solicitor General has previously observed, is a concern that parties "will likely be deterred from compiling complete and accurate information about ... hazards," weakening the effectiveness of federal safety programs. Brief for the United States as *Amicus Curiae* at 6, *State of Alabama Highway Dep't* v. *Boone*, No. 90-1412 (U.S. 1991). The statute under review, 23 U.S.C. § 409 grew out of a proposal by the Federal Highway Administration, made at the behest of the States, to address precisely this fear. *Id.* at 10.

Section 409 ensures that the safety related information collected and compiled by the States and private entities is not used as a tool in private litigation against the very parties assisting the public safety effort. In short, Congress has determined that the benefit to public safety of nondisclosure outweighs the interests individual plaintiffs have in access to

[4] A copy of the Federal Railroad Administration's form FRA F6180.71, the U.S. DOT Crossing Inventory Form, and form FRA F6180.57, for reporting railway-highway crossing accidents, are available at http://safetydata.fra.dot.gov/OfficeofSafety/Forms/Default.asp (visited June 19, 2001).

this information. *Coniker* v. *State*, 695 N.Y.S.2d 492, 495 (N.Y. Ct. Cl. 1999).

The importance of § 409 to the effectiveness of the federal highway programs is demonstrated by Congress' consistent attention to how that statute has been read by the courts over the years. Section 409 has, occasionally, received a hostile reception in State courts, which have applied it narrowly and undermined its effort to promote the data-gathering effort.

For example, before 1991, § 409 specifically excluded the protected material from admission in evidence, but was silent about discovery. As a result, some courts permitted discovery of the information even though such information was inadmissible. See *Light* v. *State*, 560 N.Y.S.2d 962, 965 (N.Y. Ct. Cl. 1990). In 1991 Congress amended § 409 to make clear that the protected material was neither discoverable nor admissible in evidence. H.R. Conf. Rep. No. 102-404, at 332 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1712.

In addition, throughout the 1990s some court decisions had undermined § 409's basic purpose by concluding that it did not protect the "raw data" that formed the bases of the reports that States would submit to the federal government when applying for federal funds.[5] In 1995, Congress corrected these misinterpretations by amending the statute to protect information "compiled or collected," whereas before the statute had only said that information "compiled" was protected. Congress intended the change to protect precisely the "raw data" that State courts had been disclosing and

[5] *See, e.g.*, *Wiedeman* v. *Dixie Elec. Membership Corp.*, 627 So. 2d 170, 173 (La. 1993) (holding that previous version of § 409 protects a state's end-product analysis of data, but not the "unedited factual material" collected to produce the end product); *Southern Pac. Transp. Co.* v. *Yarnell*, 890 P.2d 611, 613 (Ariz. 1995) (holding that pre-1995 version of § 409 does not protect the accident reports that are themselves compiled pursuant to § 409).

admitting into evidence. H.R. Rep. No. 104-246, at 59 (1995), *reprinted in* 1995 U.S.C.C.A.N. 522, 551. Specifically, Congress intended to protect more than the formal report that regulations required the States to submit to the federal government. See, *e.g.*, 23 C.F.R. § 924.15. Congress also wanted to protect the data that other regulations required the States to collect in connection with the program. See, *e.g.*, *id.* §§ 924.9(a)(1), 924.13(a)(2). By fully protecting the data State and industry officials gathered, Congress ensured those officials performed their function most vigorously.

It is this last amendment, the 1995 amendment, which the Washington Supreme Court held is beyond Congress' delegated authority to enact, and which would intrude unconstitutionally on State sovereignty. According to the Washington Supreme Court, Congress lacks the authority to protect from discovery or admission into evidence highway-safety related data that are recorded not *only* to comply with federal highway safety programs, but *also* for other reasons independent of those federal programs. *Guillen* v. *Pierce County*, 31 P.3d 628, 654-55 (Wash. 2001) (Congress cannot protect "traffic and accident materials and raw data created and collected for state and local purposes, simply because they are also collected and used for federal purposes" (emphasis omitted)). To the Washington Supreme Court, it does not matter that Congress has insisted that such data be gathered by the appropriate State agency, then organized, and analyzed for the purpose of best directing federal highway funds, and has concluded that state tort litigation using such data poses a threat to the proper operation of the federal programs.

SUMMARY OF ARGUMENT

The Washington Supreme Court took an unduly narrow view of Congress' authority under the Spending, Commerce, and Necessary and Proper Clauses. First, § 409 is valid

legislation under the Spending and Necessary and Proper Clauses to protect federal spending programs from being undermined. There is no question that the federal highway safety programs themselves are valid Spending Clause legislation. Section 409 serves to promote effective use of the federal money spent through those valid programs by relieving State and industry officials who perform the critical data-gathering function from the concern that their own efforts will be used against them in suits for money damages. By freeing the data-collectors and compilers to perform their functions without inhibition, § 409 is valid legislation ensuring the "integrity and proper operation" of federal spending programs. *Salinas* v. *United States*, 522 U.S. 52, 61 (1997).

Second, in the alternative, § 409 is a valid Spending Clause condition that Congress has imposed on the receipt of federal highway safety funds. A State accepting federal highway funds undertakes the obligation, among others, to deny private plaintiffs seeking damages access to the information gathered pursuant to the federal highway programs. This condition is reasonably related to the goal of improving highway safety because it promotes the most thorough collection of data, which Congress has deemed essential to improving safety. Contrary to the Washington Supreme Court's reasoning, it does not matter that § 409 protects all data that is eventually "collected or compiled for the purpose of" complying with federal highway safety programs, including some information that would otherwise have been compiled by state officials even if the federal programs did not exist. Congress reasonably could conclude that all information germane to the highway safety effort should be protected, even if the State originally collected or compiled it for a purpose separate from the federal program. More fundamentally, even if § 409 were overinclusive in the sense that it protected some documents from disclosure that did not directly advance Congress' valid purpose, this Court has

made clear that a condition on the receipt of federal funds is not unconstitutional merely because it is overinclusive.

Third, § 409 is necessary and proper legislation pursuant to Congress' Commerce Clause power. The Washington Supreme Court fully conceded that the various federal highway safety programs are constitutional pursuant to the Commerce Clause. And there is no doubt that § 409 is a part of those programs. This Court demands respect for Congress' judgment by deferring to its chosen method of regulating matters affecting the national economy. Yet the Washington Supreme Court asserted for itself the authority to evaluate how important § 409 is to Congress' legitimate goal, and concluded that the 1995 amendment to § 409 was not an important enough part of the federal highway programs to be constitutional. If affirmed as a rule of law, the Washington Supreme Court's analysis severely threatens Congress' ability to respond comprehensively to issues of national concern.

The Washington Supreme Court's opinion not only threatens to weaken substantially Congress' authority under the various constitutional provisions discussed above, but it also further threatens a dramatic shift in the relationship between the federal and State governments. The Washington Supreme Court relied on the even broader principle of state sovereignty to strike down the 1995 amendment to § 409. Specifically, the Washington Supreme Court concluded that Congress cannot "intrude upon state sovereignty" (by protecting highway safety-related information from state court-ordered disclosure in damages suits) unless it can show "a valid and compelling federal interest" for doing so. *Guillen*, 31 P.3d at 655. The requirement that Congress must demonstrate a "compelling federal interest" before the otherwise valid exercise of Article I, § 8 authority can be imposed on the States is wholly novel. Nothing in this Court's cases discussing the constitutional significance of State sovereignty remotely supports such a rule. If accepted, this analysis would produce the bizarre result that Congress

could constitutionally limit access to this information in federal court but not State court; a rule that would encourage forum shopping. Further, such a rule would threaten not only § 409, but various other analogous federal statutes that prevent State courts from admitting into evidence certain information gathered for federal purposes.

Finally, regardless of how this Court views the constitutional questions presented, this Court should construe § 409 so that it may accomplish Congress' purposes in enacting it. *Amicus* believes § 409 is best interpreted as protecting from disclosure any information held by the State or private parties, if that information has been collected or compiled for the purpose of federal highway safety programs. And *amicus* believes that such an interpretation raises no substantial constitutional question. Nonetheless, if this Court should conclude that the broad interpretation of § 409 raises substantial constitutional questions, then this Court should opt for a permissible, and unquestionably constitutional, narrower interpretation.

At a minimum, the 1995 amendment to § 409 protects from disclosure the documents that have been collected by those State and private officials who have been charged with collecting and compiling information for analysis in compliance with federal requirements. Such a collection and compilation of raw data might be organized and maintained in a different form than the same raw data held by other government officials, such as police. Nothing in the Washington Supreme Court's opinion suggests that it would be unconstitutional for Congress to have protected the raw data that is collected, compiled, and organized by State officials complying with federal regulations. Indeed, preventing plaintiffs from accessing the files of those State officials reflects the core of the accepted purpose of § 409: preventing plaintiffs suing for damages from using the State's and industry's public safety effort to advance their case.

ARGUMENT

I. SECTION 409 IS A VALID EXERCISE OF CONGRESS' ARTICLE I, SECTION 8 POWERS.

Much of Congress' authority to legislate regarding highway safety is not in doubt. The Washington Supreme Court did not question that the federal highway safety programs themselves represent valid legislation under both the Spending Clause and the Commerce Clause. This Court has specifically held that federal highway funding programs are valid Spending Clause legislation. *South Dakota* v. *Dole*, 483 U.S. 203, 211-12 (1987). Also, because these programs promote safety on the nation's public highways, they are a valid exercise of Congress' authority under the Commerce Clause to "'regulate and protect the instrumentalities of interstate commerce.'" *Guillen*, 31 P.3d at 653 (quoting *United States* v. *Lopez*, 514 U.S. 549, 558 (1995)). Further, there is no dispute that Congress can, as it has in § 409, regulate the flow of information these valid federal programs create. Even the Washington Supreme Court conceded that Congress can validly prohibit state courts from providing plaintiffs access to information "*originally* 'compiled'—i.e., created, composed, recorded—for the *specific* purpose[s]" connected with the various federal highway safety programs. *Id.* at 655.

In addition, the preemptive effect of § 409 is not before this Court. The Washington Supreme Court correctly concluded that "Congress clearly intended that the § 409 privilege preempt state laws and court rules governing pretrial discovery and the admissibility of evidence at trial." *Id.* at 647. Yet the Washington Supreme Court allowed the preemptive effect of § 409 to color its view of the scope of Congress' authority under Article I. The state court concluded that upholding § 409 would produce "the unacceptable effect of 'sacrific[ing] the state tort scheme on the altar of the federal statutory scheme.'" *Id.* at 655

(alteration in original) (quoting *Southern Pac. Transp. Co.* v. *Yarnell*, 890 P.2d 611, 613 (Ariz. 1995)). This analysis does serious violence to the Supremacy Clause. Federal legislation's preemptive effect does not *undermine* its constitutionality; instead, preemptive effect *follows* from the fact that the legislation is constitutional. Congress may preempt any state law (including tort law) by the exercise of a given constitutional power, even if it would leave an injured party remediless. *FERC* v. *Mississippi*, 456 U.S. 742, 759 (1982); *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344, 352-53 (2000); *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 874 (2000). The preemptive effect of § 409 has no bearing on the extent of the constitutional powers granted to Congress.

The only question before this Court, then, is whether Congress had constitutional authority to enact the 1995 amendment to § 409, which prohibits state courts from providing plaintiffs access to information that was originally created for some purpose unconnected with federal highway safety programs, but that was later "collected" pursuant to those programs. The 1995 amendment to § 409 is constitutional either because it is necessary and proper to valid Spending Clause legislation, or because it is itself a valid Spending Clause condition, or because it is a valid exercise of Congress' Commerce Clause power. Any one of these three grants of authority amply supports § 409.

Spending Clause: Section 409 is a substantive rule of law, applicable in all federal and state courts, that encourages thoroughness by precluding access to, use of, or reliance upon data and analysis "collected or compiled" for purposes of complying with federal highway safety programs.

Section 409 does not apply only in State courts sitting in States that accept federal funds. Instead, Congress protected the information "compiled or collected" pursuant to federal highway safety programs from disclosure in any "Federal or State court proceeding." By its terms, § 409 limits the use of

this information in *all* courts, whether or not the forum State accepts federal highway funds.

Section 409, then, is best understood as legislation Congress has deemed necessary and proper to ensure the most efficient use of federal highway safety funds. The constitutional validity (under the Spending Clause) of the federal highway programs themselves is not open to question. Section 409, which is "auxiliary to incontestable national power," *Greenwood* v. *United States*, 350 U.S. 366, 375 (1956), is valid pursuant to the Necessary and Proper Clause.

The Necessary and Proper Clause has been interpreted to support just this sort of legislation in the past. The Necessary and Proper Clause supports Congress' power to exempt federal agencies from State taxation; for it is clear that Congress may "preserve and protect functions validly authorized." *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232, 234 (1952). Likewise, the Rules Enabling Act, 28 U.S.C. § 2072, which provides that the federal courts may establish their own procedural rules, has been held to be "necessary and proper" to Congress' power to create the lower federal courts. *Willy* v. *Coastal Corp.*, 503 U.S. 131, 136 (1992). It is "necessary and proper" precisely because it is legislation that will help to ensure uniformity in administrative matters, leading to broad, system-wide efficiency in adjudication. *Hanna* v. *Plumer*, 380 U.S. 460, 472-73 (1965). As these cases make clear, legislation that reflects Congress' judgment of how to ensure the most effective use of its delegated powers lies at the core of the Necessary and Proper Clause. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

Section 409, including the 1995 amendment, is but one example of Congress legislating, pursuant to the Necessary

and Proper Clause, to ensure the integrity and proper implementation of federal spending programs. See, *e.g.*, 18 U.S.C. § 285 (prohibiting the taking or using of papers relating to claims for federal payment); *id.* § 286 (prohibiting conspiracy to defraud the United States with respect to claims); *id.* § 287 (federal criminal false claims act); *id.* § 666 (prohibiting bribery of agents of, and theft from, organizations supported by federal funds). As with those statutes, Congress expressly limited § 409 to protect the integrity of the federal spending programs at issue. Congress did not extend federal protection to all highway safety data and documents, but only those:

> reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites ... *pursuant to sections 130, 144, and 152 of this title* or for the purpose of developing any highway safety construction improvement project which *may be implemented utilizing Federal-aid highway funds*.

23 U.S.C. § 409 (footnote omitted; emphases added).

This Court upheld the constitutionality of analogous legislation in *Salinas* v. *United States*, 522 U.S. 52 (1997). In that case, a county jail received federal funds in return for housing federal prisoners. A deputy sheriff took bribes from a prisoner in return for allowing the prisoner to have contact visits with his wife or girlfriend. The sheriff was convicted under 18 U.S.C. § 666(a)(1)(B), which declares unlawful any bribe to an agent of an organization receiving federal assistance. This Court held that the validity of § 666(a)(1)(B) is not limited to cases where the bribe affected federal funds and concluded that "there is no serious doubt about the constitutionality of § 666(a)(1)(B) as applied to the facts of this case." *Salinas*, 522 U.S. at 60. The conviction was deemed valid because the defendant who had offered the bribes was "a prisoner held in a jail managed pursuant to a ... [federal] agreement[]," and his bribery constituted "a threat to

the integrity and proper operation of the program." *Id.* at 60-61. If Congress can impose criminal sanctions upon individuals to ensure "the integrity and proper operation" of federal spending programs, *a fortiori* it can impose discovery and evidentiary restrictions to protect the integrity and proper operation of federal spending programs on individuals bringing tort claims. See also *Legal Tender Case*, 110 U.S. 421, 449-50 (1884) (statute making treasury notes legal tender is necessary-and-proper legislation incidental to Congress' power "'to pay the debts and provide for the common defense and general welfare of the United States'").

In reasoning to the contrary, the Washington Supreme Court held that Congress was entitled to protect "materials that would not have been created but-for federal mandates," but not materials that were either created for both federal and state or local purposes, or were created originally for state and local purposes and later compiled or collected for the federal highway program. *Guillen*, 31 P.3d at 654. But it is for Congress to "exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government." *McCulloch*, 17 U.S. (4 Wheat.) at 421. Recognizing that data analysis is vital to the operation of federal highway safety programs that have saved thousands of lives, Congress, not the courts, has the right to decide what level of protection to extend to data collected or compiled for such programs, and to weigh the overall public benefits of such protections against the costs to some tort plaintiffs who may be restricted in the evidence they can discover or introduce into evidence in litigation.

And Congress had good reasons to legislate as it did. For data collected only in part for federal purposes (such as accident reports), Congress could reasonably conclude that the data collection and analysis that is vital to each of the federal programs would be skewed by fears of tort litigation. Congress is not compelled to overlook this risk simply because there may be an independent state and local purpose

for creating accident reports. For data originally created for local purposes, but is subsequently collected or compiled for use in connection with federal highway safety programs, Congress could reasonably conclude that states, localities, and other participants in the federal programs would not make the best use of available data for fear that a systematic, centralized repository of safety data would provide the plaintiff's bar a "virtually no-work[] tool for direct use in private litigation." *Light*, 560 N.Y.S 2d at 965; *Harrison* v. *Burlington N. R.R.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson* v. *Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992); *Reichert* v. *State, Dep't of Transp. & Dev.*, 694 So. 2d 193, 197 (La. 1997). Indeed, Congress was no doubt aware of the substantial risk that private litigants would use such systematic collections of accident data to establish knowledge of the danger of a highway location or railway-highway crossing, as respondents have attempted to do here. Pet'r. Br. 41-42.

Because Congress enacted § 409 pursuant to its authority to enact legislation "necessary and proper for carrying into Execution" its Spending Clause powers, U.S. Const. art. I, § 8, cl. 18, there is no need to apply the analysis of *South Dakota* v. *Dole*, 483 U.S. 203 (1987), which addresses the power of Congress to append conditions to spending grants to achieve goals that Congress could not legislate directly. *Id.* at 206-07. But if this Court were to conclude that section 409 is a Spending Clause condition, then it should readily conclude that § 409 is a *valid* Spending Clause condition.[6]

---

[6] All 50 states and the District of Columbia accepted federal highway funds in the year 2000, and thus all states may be deemed to have voluntarily accepted that § 409 applies to them. *See* Federal Highway Admin., U.S. Dep't of Transp., *Allocation of Federal Funds Administered by Federal Highway Administration for Fiscal Year 2000*, *at* http://www.fhwa.dot.gov/ohim/hs00/fa4d.htm (visited June 19, 2002) (detailing amounts of federal-aid highway funds received by State).

Congress has broad power to impose conditions upon a state's voluntary receipt of federal funds. The reason is simple. When the receipt of federal funds is the product of a state's voluntary choice, any conditions attached to those funds are themselves accepted by the state voluntarily as well. *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2100-01 (2002) (Spending Clause conditions are akin to contracts which the States voluntarily make with the federal government). Far from an affront to principles of federalism, Spending Clause conditions respect those principles by permitting federal and state governments to cooperate in advancing the general welfare. *New York* v. *United States*, 505 U.S. 144, 167-68 (1992).

This Court set forth a four-part framework for analyzing the validity of Spending Clause legislation: (1) "the exercise of the spending power must be in pursuit of the 'general welfare,'" (2) the condition must be unambiguous, (3) the condition must be related "'to the federal interest in particular national projects or programs,'" and (4) the condition must not fun afoul of any other independent constitutional limit on Congress' power. *Dole*, 483 U.S. at 207-08. Only parts three and four[7] of the *Dole* test warrant discussion.

The Washington Supreme Court argued that the 1995 amendment to § 409 failed to advance any federal interest, thus effectively concluding that it failed part three of the *Dole* test. The state court, relying largely on the dissenting opinion in *Dole*, believed that the 1995 amendment advanced no federal interest because it is overinclusive. Although it acknowledged that many kinds of data were properly protected, the court below:

> f[ound] no valid federal interest in the operation of the federal safety enhancement program is reasonably

---

[7] The only conceivable limitation independent of the Spending Clause analysis discussed here is the State sovereignty argument addressed in Part II below.

> served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and 'raw data' that were originally prepared for routine state and local purposes, simply because they are 'collected,' for, among other reasons, pursuant to a federal statute for federal purposes.

Guillen, 31 P.3d at 651 (emphasis omitted).

The court's analysis is wrong. First, there is nothing fatally overinclusive in protecting all data and reports "compiled or collected for the purpose of" highway safety evaluations, which are conducted "pursuant to" federal statute. 23 U.S.C. § 409. As discussed above, even when data was originally created in whole or part for independent state or local purposes, Congress had valid reasons for extending federal protection to that data insofar as it was collected or compiled in connection with federal spending programs.

Further, as *Dole* makes clear, any overinclusivity is constitutionally irrelevant. In *Dole*, the Court found that the relationship between a uniform drinking age and Congress' goal of promoting safe use of federally funded highways was sufficiently close to satisfy the Spending Clause. 483 U.S. at 208-09. The fact that the drinking age condition was overinclusive did not lead the Court to invalidate it. See *id.* at 214-15 (O'Connor, J., dissenting) (noting that drinking age restriction was overinclusive because it stopped youths from drinking even when they were not planning on driving). Though this Court in *Dole* left open precisely how closely related a condition must be to Congress' legislative purpose, *id.* at 208 n.3, the facts of *Dole* make clear that if the condition advances the goal, the fact that it is overinclusive does not invalidate the condition.

Here, the state court did not deny that Congress can require the states to engage in extensive data-gathering and analysis as a condition on receiving federal highway funds. Moreover, the court never denied that protecting the results of those

efforts from use in litigation advances Congress' valid goal of ensuring safety through thorough, uninhibited data-gathering and analysis. And the court did not reject the 1995 amendment in its entirety; § 409, in the court's view, exceeds Congress' Spending Clause power only as it applies to raw data *not* originally created exclusively to comply with federal highway programs. *Guillen*, 31 P.3d at 655. The Washington Supreme Court never denied that the 1995 amendment to § 409 advances Congress' legitimate interests. The court simply concluded that it swept in too much material, and struck down the amendment in its entirety. This is contrary to *Dole*.

Congress wanted states and private entities to be free of concern over how the data they were collecting and analyzing might subsequently be used by private litigants. The 1995 amendment advances that goal. The Washington Supreme Court, employing a narrow view of Congress' Spending Power contrary to *Dole*, has undermined that purpose. The decision below should be reversed.

Commerce Clause. Under the Commerce and Necessary and Proper Clauses, Congress has broad power to regulate activities that affect interstate commerce by "all means ... which are appropriate and plainly adapted to the permitted end." *United States* v. *Darby*, 312 U.S. 100, 124 (1941). The Washington Supreme Court has badly misread this Court's decisions in *Hodel* v. *Indiana*, 452 U.S. 314 (1981), *United States* v. *Lopez*, 514 U.S. 549 (1995) and *United States* v. *Morrison*, 529 U.S. 598 (2000), as severely constraining Congress' Commerce Clause power. The Washington Supreme Court has asserted that these cases direct lower courts to examine the individual components of complex statutory schemes that relate to interstate economic activity and to invalidate any specific statutory provision of the scheme that in its judgment does not directly advance a legitimate Commerce Clause goal. If allowed to stand, the Commerce Clause analysis of the Washington Supreme Court

could potentially prevent Congress from responding in a comprehensive way to matters affecting the national economy. This Court should correct the state court's undue narrowing of congressional power.

This Court has recently reaffirmed that the Commerce Clause authorizes Congress to "'regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.'" *Morrison*, 529 U.S. at 609. Further, this Court has recognized that Congress may "'regulate those activities having a substantial relation to interstate commerce.'" *Id.* Congress has specifically concluded that the inadequacies of the highway system have an impact on interstate commerce. 23 U.S.C. § 101(b); S. Rep. No. 89-1302, *reprinted in* 1966 U.S.C.C.A.N. at 2743 (noting that in 1966, when Congress began the data-driven approach, highway accidents cost the nation some $8.5 billion).

In *Hodel*, the Court described how courts should assess Commerce Clause challenges to particular components of far-reaching regulatory schemes. The district court in *Hodel* had concluded that 15 different provisions of the Surface Mining and Reclamation Control Act of 1977 could have been justified as Commerce Clause legislation only with respect to how they helped reduce air and water pollution. 452 U.S. at 322-23. The party challenging the Act argued that several of these provisions do not contribute to either of these ends. *Id.* at 329 n.17. The Court rejected the claim:

> A complex regulatory program ... can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of a regulatory program and that the regulatory scheme when considered as a whole satisfies this test.

Id.

Following *Hodel*, court review should focus on the scheme as a whole. The general orientation is one of deference to Congress' chosen methods to respond comprehensively to matters affecting the national economy. "It is not for [courts] to say whether the means chosen by Congress represent the wisest choice. It is sufficient that Congress was not irrational in concluding that limited federal regulation ... was essential to protect interstate commerce." *FERC*, 456 U.S. at 758; *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 261-62 (1964) (the structure of a federal regulatory scheme that is, as a general matter, constitutional "is within the sound and exclusive discretion of Congress"). The Washington Supreme Court correctly recognized that the federal highway safety programs are valid "'when considered as a whole.'" *Guillen*, 31 P.3d at 654. Following *Hodel* and *Heart of Atlanta Motel* and *FERC* v. *Mississippi*, the court should then have deferred to Congress' chosen method of achieving its legitimate objective.

Instead, the Washington Supreme Court took a wrong turn. It seized on the language in *Hodel* indicating that the various components of a regulatory program must all be "integral" to the program's operation to authorize aggressive judicial review of Congress' chosen means to achieve its legitimate ends. It claimed that this Court's recent decisions in *Lopez* and *Morrison* supported its novel reading of *Hodel* because in those decisions this Court had "eroded" the "precedential authority" that would require courts to defer to Congress on matters affecting state sovereignty. *Id.* at 653.

The court ultimately concluded that § 409 was not an "integral part" of the federal highway safety programs because the court could not "see how [any] federal purposes are reasonably served by also barring the discovery and admissibility in state court of routinely prepared state and local traffic and accident materials and data that would exist even had a federal safety enhancement program never been created." *Id.* at 654. Put another way, the court interpreted

the "integral part" language in *Hodel* to require lower courts to examine whether any challenged component of a federal regulatory program itself independently and directly serves a valid Commerce Clause purpose. *Hodel* was thus read to contradict itself.

Nothing in this Court's cases permits reading *Hodel* to undermine itself. *Lopez*, for example, reaffirmed the long-recognized view, that "'where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" 514 U.S. at 558 (emphasis omitted) (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)). As this Court said in *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (emphasis omitted): "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."[8] Similarly, where a regulatory program as a whole is within Congress' Commerce Clause power, the courts have no power to excise, as trivial, individual components of the program.

Under a properly deferential standard, the 1995 amendment to § 409 is constitutional. It is sufficiently connected to Congress' effort to promote highway safety, and thereby protect the channels of interstate commerce, to satisfy the "integral part" standard of *Hodel*. As a component of the

---

[8] *Morrison* carved out a narrow exception. This Court refused to allow Congress to aggregate the effects on commerce of violent criminal conduct to authorize federal regulation of such conduct. 529 U.S. at 617-18. This case, of course, involves nothing of the sort. *Morrison* reaffirmed that Congress Commerce power is at its strongest when it regulates commercial activity. *Id.* at 610. And *Morrison* reaffirmed that the Commerce Clause empowers Congress to "'regulate and protect the instrumentalities of interstate commerce ... even though the threat may come only from intrastate activities.'" *Id.* at 609. Keeping the highways clear of the obstructions created by accidents is vital regulation of the channels of commerce.

legislative scheme promoting highway safety, Congress may ensure that public and private officials are not deterred from providing the most thorough collection and analysis of safety related data. *City of Atlanta* v. *Watson*, 475 S.E.2d 896, 903 (Ga. 1996) (federal provision privileging noise exposure maps created in compliance with federal Noise Abatement Act is "integral part" of federal program). Section 409 is an "integral part"—a part that reasonably (even if indirectly) promotes the ultimate aim—of a lawfully enacted regulatory scheme. Congress, therefore, has the authority to enact it.

II. SECTION 409 DOES NOT OFFEND PRINCIPLES OF STATE SOVEREIGNTY.

The Washington Supreme Court's decision contains an alternative line of reasoning even more out of step with this Court's decisions than its narrow reading of Congress' powers under Article I. The state court concluded that this Court's recent cases highlighting the importance of State sovereignty in our federal system requires Congress to demonstrate a "compelling federal interest" when it "intrude[s] upon state sovereignty by barring state and local courts from admitting [raw data related to federal highway safety programs] into evidence." *Guillen*, 31 P.3d at 655. The application of strict scrutiny to Congress' decision to impose a rule of law upon state courts pursuant to the Supremacy Clause reflects a profound misreading of this Court's State sovereignty decisions.

A federal statute enacted pursuant to one of Congress' Article I powers may nevertheless be invalid if it intrudes upon the fundamental principles of State sovereignty embodied in the Constitution. For example, Congress may not abrogate a State's sovereign immunity from damages suits by private individuals even when such a statute is otherwise a part of valid commerce clause legislation. See, *e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 732 (1999). Likewise, Congress may not commandeer state officials either to "issue directives requiring the States to address particular problems, nor [may

Congress] command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz* v. *United States*, 521 U.S. 898, 935 (1997); *New York*, 505 U.S. at 162. If a statute violates these fundamental principles of State sovereignty, the statute is invalid; this Court has never examined the statute to determine if the federal interest involved is sufficiently "compelling" to overcome the sovereignty interest of the State.

So the state court was wrong to seek out a "compelling federal interest" that might validate a fundamental intrusion on State sovereignty. But, even more fundamentally, the state court was wrong to conclude that § 409 intrudes upon State sovereignty at all. Section 409 does not represent an attempt by Congress to abrogate State sovereign immunity. Neither has Congress sought to "commandeer" state officials in carrying out the tasks necessary to improve highway safety. Congress has instead solicited the cooperation of State officials to perform the crucial data-gathering function; no State official need perform any administrative task unless the State voluntarily chooses to accept federal money.

Section 409 merely requires that State courts respect the privilege Congress has enacted in § 409. That is, § 409 is nothing more than federal rule of law equally applicable in federal and State court. If such a rule represents an intrusion on State sovereignty, then *every* federal rule of law that State courts must enforce pursuant to the Supremacy Clause reflects an intrusion on State sovereignty, and is therefore subject to attack even if the rule of law is clearly within Congress' Article I powers to enact.

Were the Washington Supreme Court correct, numerous federal statutes could be left applicable only in federal court, not in State court, creating precisely the system of inconsistent enforcement that the Supremacy Clause was designed to prevent. There are a number of transportation-related federal statutes that purport to prevent State as well as federal courts from introducing into evidence certain

documents relevant to federal programs. See, *e.g.*, 49 U.S.C. § 504(f) (motor carrier accident reports); *id.* § 20903 (railroad accident reports); *id.* § 47507 (noise exposure maps in connection with airports). The Washington Supreme Court would invite courts throughout the nation to determine whether the federal interest reflected in these, and myriad other statutes, is sufficiently "compelling" to require State as well as federal court enforcement. That inverts the constitutional design reflected in the Supremacy Clause.

The Supremacy Clause was designed to resolve conflicts between State and federal law in favor of the federal rule. *Public Utils. Comm'n* v. *United States*, 355 U.S. 534, 544 (1958); *Testa* v. *Katt*, 330 U.S. 386, 390-91 (1947); *McCulloch*, 17 U.S. (4 Wheat.) at 427 ("It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments ...."). To be sure, the Supremacy Clause does not override the fundamental sovereignty interests of the States that were preserved in the constitutional design. *Alden*, 527 U.S. at 732. But the constitutional design did not reserve so much sovereign authority to the States that every federal rule of law must be shown, to the satisfaction of a court, to advance a "compelling federal interest" before that rule is binding on State court decisions as well as federal. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."). As this Court recently reaffirmed, the principle of State sovereignty does not prevent Congress from "'regulat[ing] state activities'"; rather, the principle of State sovereignty prevents Congress from "'seek[ing] to control or influence the manner in which States regulate private parties.'" *Reno* v. *Condon*, 528 U.S. 141, 150 (2000) (second alteration in original) (quoting *South Carolina* v. *Baker*, 485 U.S. 505, 514-15 (1988)).

III. THIS COURT SHOULD GIVE SECTION 409 A NATURAL CONSTRUCTION SUFFICIENT TO ACCOMPLISH ITS PURPOSES.

Respondents and the concurring justice below have taken the position that § 409 does not protect discovery from the "original source" of an accident report, if that original source did not collect the information pursuant to federal statutory mandates. *Guillen*, 31 P.3d at 659 (Madsen, J., concurring); Br. Opp. 17-19.

There is no reason to adopt such a constricted reading of the statute. Congress has concluded that the best way to promote the most thorough compilation and collection of accident information is to ensure that such information is not used to impose monetary damages on those collecting and compiling it. To accomplish that goal, Congress protected the *information* from disclosure or admission into evidence. As Congress explained, the "raw data" itself was being included within the protection of § 409 – any "raw data" that would be "made part of any formal or bound report" created pursuant to federal highway safety statutes. H.R. Rep. No. 104-246, at 59, *reprinted in* 1995 U.S.C.C.A.N. at 551. Congress did not distinguish between "raw data" originally created to comply with federal highway safety programs, and other raw data relevant to those programs that was originally created for other purposes.

This Court, in a similar context, also refused to draw such a distinction. In *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 154-55 (1989), this Court held that a FOIA exemption for documents "compiled for law enforcement purposes" includes documents originally created for another purpose but which the government later compiled for law enforcement purposes, and thus prevents disclosure even by the separate government department that originally created it. As this Court recognized, "the word 'compile' naturally ... refer[s] even to the process of gathering at one time records and information that were generated on an earlier occasion and for

a different purpose." *Id.* at 154. Consistent with *John Doe Agency*, the best reading of § 409 would protect all the raw data that is "collected and compiled" to comply with federal highway safety statutes, whatever the reason for its original creation, and wherever that raw data is held within the State. Moreover, the doctrine of constitutional avoidance cannot be invoked to reject this natural reading of the statute. That doctrine only applies when the best reading of the statute raises "'grave and doubtful constitutional questions,'" *Jones* v. *United States*, 526 U.S. 227, 239 (1999), and as discussed above no such grave doubts are raised in this case.

Even if this Court were inclined to construe section 409 narrowly to permit discovery of information from an "original source" with no connection to a federal highway safety program, it should make clear the limits of any such "original source" exception. First, even if the data was originally collected exclusively for unrelated purposes, in all events the subsequent collection and compilation for purposes of implementing federal highway safety programs would be entitled to § 409 protection. In other words, even under a narrow view of § 409, the plaintiff could only seek discovery from an entity that separately holds the data or reports for purposes unrelated to the federal program. Thus, here, respondents would not be entitled to discovery of materials from the Pierce County Public Works Department, even if *arguendo* it could seek discovery from independent sources. See Petr. Br. 46-47.

Second, and relatedly, if an entity's collection or compilation of data or reports is used in any part for the purpose of federal highway programs, the entire collection or compilation is protected by § 409. Thus, the Washington Supreme Court is indubitably correct that a plaintiff cannot demand discovery of the data in a single electronic database of accident reports that is used in part for federal highway safety programs, and in part for law enforcement purposes. *Guillen*, 31 P.3d at 645-46. Nor could a plaintiff demand

access to a railroad's files, reports, or databases simply because they are used for operational purposes as well as for the Section 130 program. The protection of the federal interest is paramount.

Third, if the original collection of data is in any part for the purpose of implementing federal highway safety programs, § 409 applies. Here, the State of Washington has adopted regulations defining the content of accident reports in order to comply with the mandates of federal highway safety statutes, Wash. Admin. Code §§ 136-28-010, 136-28-030, and thus all accident reports (whether created by local sheriffs or the state highway patrol) are subject to the protections of § 409 because they were "collected or compiled" pursuant to those regulations. So even if there were a separately held collection of accident reports held by the state highway patrol, plaintiffs would not be entitled to discovery. Similarly, any data or reports that the railroad collects or compiles in part for the purpose of the Section 130 program are protected under § 409, even if the railroad also collects such data for its own internal purposes.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

LOUIS P. WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
Law Department
50 F Street, N.W.
Washington, D.C. 20001-1564
(202) 639-2505

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ROBERT N. HOCHMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for the Association of American Railroads

* Counsel of Record

July 3, 2002

(13)

Supreme Court U.S.
FILED
JUL 3 2002
OFFICE OF THE CLERK

No. 01-1229

In The
Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

V.

IGNACIO GUILLEN, AS LEGAL GUARDIAN FOR JENNIFER GUILLEN AND ALMA GUILLEN, MINORS; AND MARIANO GUILLEN, AS LEGAL GUARDIAN FOR PAULINA GUILLEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Washington

AMICUS BRIEF OF THE STATE OF LOUISIANA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

RICHARD P. IEYOUB
Attorney General
JOHN C. YOUNG*
JAMES R. DAWSON
Assistant Attorneys General
626 N. 4th Street, Fifth Floor
Baton Rouge, Louisiana 70804-9095
(225) 342-8717

and

LAWRENCE A. DURANT
General Counsel, State of Louisiana, Department of Transportation and Development
P. O. Box 94245
1201 Capitol Access Road
Baton Rouge, Louisiana 70804-9245
(225) 379-1207

**Counsel of Record for Amicus Curiae*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

56 pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
1. Congress has the constitutional right to create national highway safety improvement programs and to condition the voluntary participation in those programs on the acceptance of the terms of a contractual agreement that is in furtherance of a relevant and valid interest reasonably related to a specific worthwhile national program	4
a. The right of Congress to create federal-aid programs and to condition the voluntary participation in those programs	4
b. The valid interest of Congress in promoting highway safety and the effective spending of public funds	5
c. The constitutionality of § 409	9
2. A state's public record law is preempted by § 409	11
3. The accident reports sought by the plaintiffs are the type of document protected from discovery or other use contemplated by § 409	14

TABLE OF CONTENTS – Continued

Page

4. The accident report sought by the plaintiffs in this suit for damages is protected from discovery or other use, regardless of whether it was prepared exclusively for safety improvements or whether it is available for other uses in non-tort proceedings and regardless of whether it was prepared by highway officials or is in their custody 17

   a. The rules of statutory construction 18

   b. Accident reports need not be created solely for federal reporting requirements to fall within § 409 19

5. The federal statute (§ 409) is but one of several federal statutes that impose exact or similar discovery and evidentiary restrictions in suits in tort, and if the decision of the Washington State Supreme Court is allowed to stand, the validity of those statutes would become at issue, attacking the legitimacy of Congress to determine terms to effectuate the implementation of its programs . 22

CONCLUSION 26

TABLE OF CONTENTS – Continued

Page

APPENDICES:

A. *Proposed Amendment to Highway Safety Legislation*, U.S. Department of Transportation, Federal Highway Administration, May 4, 1983, Memorandum of Marshall Jacks, Jr.....App. 1

B. *Final Model Minimum Uniform Crash Criteria (MMUCC)*, U.S. Department of Transportation, National Highway Traffic Safety Administration, Federal Highway Administration, August 1998.....App. 4

TABLE OF AUTHORITIES

Page

CASES

Baldrige v. Shapiro, 455 U.S. 345 (1982) 23

Carter v. U.S., 530 U.S. 255 (2000) 18

Claspill v. Missouri Pacific R. Co., 793 S.W.2d 139 (Mo. 1990), *cert. denied*, 498 U.S. 984 (1990) 9

Coniker v. State of New York, 695 N.Y.S.2d 492 (N.Y.Ct.Cl. 7/26/99) 19

Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992) 18

Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. (Ga.) Aug. 21, 1997), *reversed on other grounds, Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) 5

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 18

Ex parte Alabama Dept. of Transp., 757 So.2d 371 (Ala. Dec. 17, 1999) 11, 12

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 9

Gaubert v. Denton, 1999 WL 350103 (E.D.La. May 28, 1999), *affirmed by*, 210 F.3d 368 (5th Cir. (La.) Feb. 17, 2000) 10, 11, 24

Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) 5

Guillen v. Pierce County, 31 P.3d 628 (Wash. Sep. 13, 2001) 5

Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000) 18

TABLE OF AUTHORITIES – Continued

Page

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 18

John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989) 21

Lusby v. Union Pacific R. Co., 4 F.3d 639 (8th Cir. (Ark.) 1993) 20

Mackie v. Grand Trunk Western Railroad Co., 544 N.W.2d 709 (Mich.App. 1995) 20

Martinolich v. Southern Pacific Transp. Co., 532 So.2d 435 (La.App. 1 Cir. 1988), *writ denied*, 535 So.2d 745 (La. 1989), *cert. denied, Louisiana Dept. of Transp. and Development v. Nick Martinolich, Inc.*, 490 U.S. 1109 (1989) 10

New York v. United States, 505 U.S. 144 (1992) 4, 5

Palacios v. Louisiana and Delta R.R., Inc., 2000-00971 (La.App. 3 Cir. 12/29/00), 775 So.2d 698, *writ denied*, 2001-0565 (La. 5/4/01), 791 So.2d 653 10

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 4

People of State of Cal. ex rel. Dept. of Transp. v. U.S., 27 Fed.Cl. 130 (Fed.Cl. Oct. 30, 1992) 6

Powers v. CSX Transp., Inc., 177 F.Supp.2d 1276 (S.D. Ala. 2001) 20

Reichert v. State, Dept. of Transp. and Development, 96-1419 (La. 5/20/97), 694 So.2d 193 10

Robertson v. Union Pacific R. Co., 954 F.2d 1433 (8th Cir. (Ark.) 1992) 20

TABLE OF AUTHORITIES – Continued

Page

Sawyer v. Illinois Cent. Gulf R. Co., 606 So.2d 1069 (Miss. 1992) 9

Seaton v. Johnson, 898 S.W.2d 232 (Tenn.Ct.App. Jan 27, 1995), *appeal denied* (May 01, 1995) 12

South Carolina v. Baker, 485 U.S. 505 (1988) 9

South Dakota v. Dole, 483 U.S. 203 (1987) 4, 5

St. Regis Paper Co. v. U. S., 368 U.S. 208 (1961) 19, 25

Taylor v. St. Louis Southwestern Ry. Co., 746 F.Supp. 50 (D. Kan. 1990) 20

Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118 (1939) 11

United States v. Weber Aircraft Corporation, 465 U.S. 792 (1984) 13

Wiedeman v. Dixie Elec. Membership Corp., 627 So.2d 170 (La. Nov. 29, 1993), *cert. denied*, *Louisiana Dept. of Transp. and Development v. Wiedeman*, 511 U.S. 1127 (1994) 10

STATUTES AND REGULATIONS

U.S. Const. art. I, § 8, cl. 1 ..... 4, 9

5 U.S.C. § 552 13

10 U.S.C. § 1102(b) 23

13 U.S.C. § 9(a) 23

14 U.S.C. § 645(b) 23

15 U.S.C. § 2055 23

20 U.S.C. § 9007(b)(1) 23

21 U.S.C. § 360i(b)(3) 23

TABLE OF AUTHORITIES – Continued

Page

23 U.S.C. § 133 7

23 U.S.C. § 152 ..... *passim*

23 U.S.C. § 402 ..... 15, 16, 23, 24

23 U.S.C. § 402(k)(1) 24

23 U.S.C. § 409 ..... *passim*

23 U.S.C. § 411 16

33 U.S.C. § 930(c) 23

49 U.S.C. § 504(f) 23

49 U.S.C. § 1154(a)(5)(b) 23

49 U.S.C. § 1154(b) 23

49 U.S.C. § 20703(c) 23

49 U.S.C. § 20903 23

49 U.S.C. § 47507 23

23 C.F.R. § 1.1 6

23 C.F.R. § 1.9 6

23 C.F.R. § 924.9 ..... 6, 14

23 C.F.R. § 924.13 ..... 6, 14

23 C.F.R. § 1335.1 *et. seq* 16

23 C.F.R. § 1335.3(e) 16

INTEREST OF *AMICUS CURIAE*

This amicus brief is filed on behalf of the State of Louisiana and submitted by its Attorney General, Richard P. Ieyoub. Under Rule 37(4) consent of the parties and leave of this Honorable Court for this filing is not required.

This Honorable Court has granted certiorari to review a decision of the Supreme Court of the State of Washington wherein that court declared a federal statute (23 U.S.C. § 409) unconstitutional. This statute is a procedural rule that provides that records and reports that have been collected and compiled as part of the voluntary participation in federal highway safety improvement programs cannot be either discovered or ultimately used in any manner in any suit for damages.

In pursuit of a lawsuit for damages, the plaintiffs had sought in pre-trial discovery materials and data relating to the accident history for the intersection where their accident occurred. Pierce County interposed § 409 in opposition to the release of the requested accident reports, accident history and associated data within the context of this tort action.

On an eventual appeal, the Washington State Supreme Court ordered the production, holding that § 409 was unconstitutional.

This brief is submitted in support of Pierce County and the State of Louisiana asks that this Honorable Court reverse the decision of the Washington State Supreme Court.

Louisiana, like the State of Washington, receives substantial sums under various federal highway safety improvement programs. To participate in these voluntary

programs, it collects, compiles, and utilizes a significant amount of information, including the types of data and records sought to be discovered by the plaintiffs in this case.

To facilitate candid evaluation and highway safety improvement planning, Congress implemented § 409, creating a discovery and evidentiary bar in tort litigation and thereby choosing to preempt state and federal discovery and evidentiary rules to the contrary that would otherwise allow either the discovery of the material sought by the plaintiffs in this case or its use for any purpose in a suit for damages.

Louisiana is one of the few states whose courts have addressed the constitutionality of this federal statute. Its courts have found the statute to be a permissible preemption of its state discovery and evidentiary rules as Congress has a relevant and valid interest reasonably related to a specific worthwhile national program.

Louisiana recognizes that this preemption is in the exercise of the worthy goal of Congress to improve the safety of this nation's highways. Louisiana asserts, as does Pierce County, that the accident reports, accident history, and other data requested by the plaintiffs are protected by the statute from discovery or other use in this trial for damages.

SUMMARY OF THE ARGUMENT

In its brief, Pierce County, presents valid reasons why this Honorable Court should reverse the decision of the Washington State Supreme Court.

There are other equally valid reasons why this Honorable Court should reverse the decision of the Washington State Supreme Court as Congress has a valid federal interest in preempting state court discovery and evidentiary rules in the furtherance of promoting the safety of our nation's highways.

States are required to collect and compile accident information in order to obtain federal-aid funding for highway safety improvements and to insure that those funds are being obtained and utilized in a priority manner. The sole source of the data required to be collected and compiled is the accident report completed by the investigating officers.

As such, these accident reports and the accident histories generated from those reports are the necessary antecedents to the planning and evaluation process and are specifically the type of document protected by § 409 from discovery or other use in a civil suit for damages such as this.

Further, an accident report is protected from use regardless of whether such a report was prepared exclusively for safety improvements or whether such a report is available for other uses in non-tort proceedings, regardless of whether the report was prepared by highway officials or by police, and regardless of which public agency maintains custody of the report. To hold otherwise would circumvent the clear expression of the intent of Congress to limit to the use of such a report.

It is crucial to note that § 409 is but one of several federal statutes that impose exact or similar discovery and evidentiary restrictions in suits in tort. If the decision of the Washington State Supreme Court is allowed to stand,

the validity of those statutes would become at issue, attacking the legitimacy of Congress to determine terms and inducements to effectuate the implementation of its programs.

ARGUMENT

1. Congress has the constitutional right to create national highway safety improvement programs and to condition the voluntary participation in those programs on the acceptance of the terms of a contractual agreement that is in furtherance of a relevant and valid interest reasonably related to a specific worthwhile national program

a. The right of Congress to create federal-aid programs and to condition the voluntary participation in those programs

This Honorable Court has long recognized, that pursuant to Congress' power to legislate under the Spending Clause (U.S. Const. Art. I, § 8, cl. 1), Congress may fix the terms on which it may disburse federal money to the states. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

Legislation enacted pursuant to the spending power is in the nature of a contract. *Pennhurst*, *supra* at 17. In return for federal funds, the states agree to comply with the conditions that Congress has attached to its offer. *Pennhurst*, *supra* at 17; *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

A prospective recipient state is free to decline a grant of federal funding. *New York v. United States*, 505 U.S. 144, 168 (1992). Similarly, a current recipient may withdraw

from a federal program and decline further funding if it so chooses. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1399 (11th Cir. (Ga.) Aug. 21, 1997), *reversed on other grounds*, *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), citing *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 596 (1983).

The freedom of recipients to decline a grant of federal funding ensures that they will remain responsive to the preferences of their local constituents. *New York v. U.S.*, *supra* at 168.

Valid conditions imposed with federal funding bear a relationship to the purpose of the federal spending. *New York v. U.S.*, *supra* at 168, citing *South Dakota v. Dole*, *supra* at 207-208.

b. The valid interest of Congress in promoting highway safety and the effective spending of public funds

While any number of federal highway safety programs are available to the states and to local governments, the one most applicable in the instant case is the Hazard Elimination Program (23 U.S.C. § 152).[1]

The Code of Federal Regulations implementing § 152 and other federal highway safety programs require that

[1] Pierce County had identified this intersection as especially hazardous and applied for federal hazard elimination funds under § 152. That application was denied. The County then reapplied on April 3, 1996, and on July 26, 1996, three weeks after this fatal accident, the application was granted. See, decision of Washington State Supreme Court, *Guillen v. Pierce County*, 31 P.3d 628, 633 (Wash. Sep. 13, 2001).

the states comply with certain conditions to receive federal-aid funds. 23 C.F.R. §§ 1.1, 1.9; *People of State of Cal. ex rel. Dept. of Transp. v. U.S.*, 27 Fed.Cl. 130 (Fed.Cl. Oct. 30, 1992): "This regulation, in mandatory terms, prohibits federal fund participation in any cost incurred in violation of federal or state law, the regulations set forth in the C.F.R., or as prescribed by policies and procedures of the Administrator of FHWA."

Among these regulations are ones that require that the states collect and compile accident histories, which are of course dependent upon the collection and compilation of accident reports, for analysis of locations for planning potential improvements and evaluating the proposed measures at those locations.[2]

This obligation to conduct and systematically maintain an engineering survey is for *all* public roads, not just those that may be part of a state highway system (§ 152(a)(1)), as funds authorized to carry out the hazard elimination

[2] See, i.e., 23 C.F.R. § 924.9 Planning (Highway Safety Improvement Program).

> "(a) The planning component of the highway safety improvement program shall incorporate:
>
> "(2) A process for analyzing available data to identify highway locations, sections and elements determined to be hazardous on the basis of *accident experience* or accident potential."

See, also, 23 C.F.R. § 924.13 Evaluation (Highway Safety Improvement Program).

> "(a) The evaluation component of the highway safety improvement program in each State shall include a, including:
>
> "(2) *A record of accident experience before* and after the implementation of a highway safety improvement project."

program are available for expenditure on *any* public road (§ 152(c)(1)).[3]

An additional condition imposed in order to secure the federal funds is that the states report to the Secretary of Transportation on a yearly basis the progress being made to implement safety improvement projects for hazard elimination and the effectiveness of those improvements. Each state report *shall* contain, among other things, "the *previous* and subsequent *accident experience* at these locations." (§ 152(g)). This report *shall* also contain "the *previous* and subsequent *accident experience* at improved locations." (§ 152(g)).

The trade-off for these requirements that such accident experience be compiled, collected, and utilized to plan and evaluate safety improvements and then that those evaluations be systematically reported to the Secretary of Transportation is the protection afforded by § 409 that the enforced compilation and collection of such data not then be subject to either discovery (as at issue in this case) or otherwise used in a tort action (which is, of course, the ultimate result of the Washington State Supreme Court's decision).

[3] In addition to the local projects authorized under § 152, numerous highway safety improvement programs also address the additional ability of local governments to apply for federal funding of local projects for hazard elimination on their roads and bridges, see, i.e., 23 U.S.C. § 133 (Surface Transportation Program). These additional hazard elimination projects, and the availability of federal funding, are also conditioned on the analysis of justifying data to affect a proper prioritization in the expenditure of both federal and local funds and are often under the administration of the states.

This trade-off was expressly recognized by the Federal Highway Administration in its attempts to implement § 409.

In a May 4, 1983, memorandum regarding the "Proposed Amendment to Highway Safety Legislation" (reprinted in full at Appendix A), the Associate Administrator for Safety, Traffic Engineering, and Motor Carriers at the time, Marshall Jacks, Jr., argued:

> "For the past several years, we have attempted to include in the Department's legislative program a provision to protect from disclosure information compiled by States to identify and prioritize roadway hazards. It has been consistently brought to our attention that highway departments are reluctant to undertake such efforts (as required by 23 USC 152, for instance) for fear that acknowledging the existence of hazardous conditions would expose them to liability.
>
> It is noted that our suggestion was included in DOT's Legislative Program for the 97th Congress, 2nd Session, in the second category. We also note that highway safety legislation is being introduced in this legislative session. In the event such safety legislation receives serious consideration, it is recommended that an amendment be included to protect information compiled for purposes of safety enhancement."

The memorandum went on to set out proposed language for such an amendment, language virtually identical to that of the subsequently enacted § 409.

c. The constitutionality of § 409

By determining that there is no relevant and valid federal interest reasonably related to a specific worthwhile national program, the Washington State Supreme Court reached a decision in direct conflict with contrary determinations by the state supreme courts of Missouri, Mississippi, and Louisiana.

In *Claspill v. Missouri Pacific R. Co.*, 793 S.W.2d 139, 141 (Mo. 1990), *cert. denied*, 498 U.S. 984 (1990), the Missouri State Supreme Court held, that in creating § 409, Congress was acting in constitutional concert with the Commerce Clause (U.S. Const., art. I, § 8, cl. 3), citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985) and *South Carolina v. Baker*, 485 U.S. 505 (1988).

A constitutional challenge was also rejected by the Mississippi State Supreme Court in *Sawyer v. Illinois Cent. Gulf R. Co.*, 606 So.2d 1069 (Miss. 1992). In finding no basis for a constitutional rejection of § 409, that court noted:

> "[N]obody made Mississippi get into the railroad crossing safety enhancement program. It is a voluntary program. Duly authorized officials of this state, however, have committed us to the program – in exchange for ninety percent federal funding – and it does not strike us outrageous that we should accede to the federal government's rules and regulations appertaining thereto. We have it on good authority that Missouri and Louisiana have rejected challenges to Section 409. See *Claspill v. Missouri Pacific Railroad Co.*, 793 S.W.2d 139 (Mo. 1990); *Martinolich v. Southern Pacific Transportation Co.*,

532 So.2d 435 (La. Ct.App. 1988). We accept Section 409 as controlling, as well." 606 So.2d at 1074.

In *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So.2d 170 (La. Nov. 29, 1993), *cert. denied, Louisiana Dept. of Transp. and Development v. Wiedeman*, 511 U.S. 1127 (1994), the Louisiana State Supreme Court noted, that despite the State's substantial interest in the application of its discovery and evidentiary rules:

> "§ 409's explicit preemptive language overrides conflicting state law by virtue of the Supremacy Clause. U.S. Const. art. VI, cl. 2; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, 613 (1977). Section 409 controls. *Beecher v. Keel*, 607 So.2d 549 (La.1992). See also *Claspill v. Missouri Pacific Railroad Company*, 793 S.W.2d 139, 140 (Mo. banc 1990)." 627 So.2d at 172.[4]

A federal court for Louisiana, *Gaubert v. Denton*, 1999 WL 350103 (E.D.La. May 28, 1999), *affirmed by*, 210 F.3d 368 (5th Cir. (La.) Feb. 17, 2000), has also found that § 409 violates neither procedural due process nor the right of access to the courts.

---

[4] The Louisiana State Supreme Court also rejected a constitutional challenge to § 409 in *Reichert v. State, Dept. of Transp. and Development*, 96-1419, p.7 (La. 5/20/97), 694 So.2d 193, 199, as have Louisiana state appellate courts. See, i.e., *Martinolich v. Southern Pacific Transp. Co.*, 532 So.2d 435 (La.App. 1 Cir. 1988), *writ denied*, 535 So.2d 745 (La. 1989), *cert. denied, Louisiana Dept. of Transp. and Development v. Nick Martinolich, Inc.*, 490 U.S. 1109 (1989), and *Palacios v. Louisiana and Delta R.R., Inc.*, 2000-00971 (La.App. 3 Cir. 12/29/00), 775 So.2d 698, *writ denied*, 2001-0565 (La. 5/4/01), 791 So.2d 653.

In rejecting the challenges to § 409 under the First, Fifth, Tenth, and Fourteenth Amendments to the United States Constitution, the *Gaubert* court commented that "every court that has considered the privilege, both federal and state, has concluded that it serves the legitimate purpose of fostering the collection and evaluation of highway safety information free from the threat of future tort actions."[5]

That court, in applying the holding of *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939), to the facts at hand, further found that the plaintiff lacked standing to bring his Tenth Amendment challenge.

2. A state's public record law is preempted by § 409

The Washington State Supreme Court also held, that as to the requested accident reports, history and associated data, prohibiting discovery under § 409 was in contravention of that state's Public Disclosure Act.

In *Ex parte Alabama Dept. of Transp.*, 757 So.2d 371 (Ala. Dec. 17, 1999), the Alabama Supreme Court faced a similar situation. After finding that § 409 preempted state discovery statutes, that court further found that the statute also preempted that state's public document laws as to the rights of citizens to inspect and copy public writings.

---

[5] *Gaubert v. Denton*, *supra* at p.9.

In so holding, that court noted:

"[U]nder the facts of this case, the application of § 36-12-40 [the Alabama public inspection law] would make it impossible for ALDOT to comply with § 409, as amended in 1995, and with the expressed intent of Congress with regard to the amended § 409. See *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 110 S.Ct. 2024, 109 L.Ed.2d 474 (1990). Thus, where § 36-12-40 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress' (*id.*, at 506, 110 S.Ct. 2024), that section is preempted by the federal law. See, also, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993)." 757 So.2d at 374.[6]

A Tennessee state appellate court also rejected a Tenth Amendment challenge to the supremacy of § 409 and found that § 409 did constitutionally bar the discovery of a location's accident history despite that state's Public Records Act. See *Seaton v. Johnson*, 898 S.W.2d 232, 236 (Tenn.Ct.App. Jan. 27, 1995), *appeal denied*, (May 01, 1995): "It would be an anomaly for this Court to deny access to the State's copy of its report to the federal government only to require the State to compile from its records a report to plaintiff identical with that furnished to the federal government."

[6] It is also noted that in *Ex parte Alabama Dept. of Transp.*, *supra*, the Alabama Supreme Court added in *dicta* that:

> "[T]he information sought by Hitchcock – reports of accidents occurring at the site of Hitchcock's accident – is under the custody and control of the Alabama Department of Public Safety. Hitchcock is not without a source for the information he alleges he requires in order to be able to proceed with any legal action to recover damages for his injuries." 757 So.2d at 374.

For the reasons expressed herein, it is submitted that this gratuitous comment on an issue not before that court was erroneous.

The present situation is analogous to one faced by this Honorable Court before.

In *United States v. Weber Aircraft Corporation*, 465 U.S. 792 (1984), this Court held that an investigative report conducted pursuant to Air Force regulations providing that such safety investigations were not to be used for any purpose other than accident prevention was exempt from discovery in a civil suit as an exception under the Freedom of Information Act.[7] This Court also stated that to allow the obtaining through the FOIA of material that was normally privileged would create an "anomaly" in that the FOIA could then be used to supplement civil discovery, a construction of the FOIA that the Court had consistently rejected.[8]

Nothing in § 409 takes public information about accidents and converts it to private, secret information. The analysis can be, and often is, publicized widely. However, this analysis, and the material gathered to formulate that analysis, just cannot then be subject to discovery within the context of this suit for damages *or* otherwise used in a courtroom to obtain a money judgment

[7] 5 U.S.C. § 552.

[8] *United States v. Weber Aircraft Corporation*, 465 U.S. at 801.

for damages, whether against a state, municipal government, or private entity.

3. The accident reports sought by the plaintiffs are the type of document protected from discovery or other use contemplated by § 409.

To comply with the planning and evaluation requirements of § 152 to provide a "process for analyzing available data to identify highway locations, sections and elements determined to be hazardous on the basis of accident experience or accident potential"[9] and a "process for determining the effect that highway safety improvement projects have in reducing the number and severity of accidents and potential accidents,"[10] states such as Washington (and Louisiana) use an accident report form.

This report form is actually a data collection form with over 110 separate data fields that are entered by an investigator. As noted by Pierce County, these reports are completed not by highway department employees, but by investigating state, county, or municipal police officers. The original reports themselves are maintained by those entities.

In Louisiana, copies of these reports are forwarded on a periodic basis to the Louisiana Highway Safety Commission which in turn forwards the reports to the Hazard Elimination Program Section of the Department of Transportation and Development for "spotting." Spotting is a

[9] See 23 C.F.R. § 924.9(a)(2), *supra*.

[10] See 23 C.F.R. § 924.13(a)(2), *supra*.

process by which DOTD employees place information on the report to identify that report with a specific section of highway. The reports are then returned to the safety commission which, using 23 U.S.C. § 402 funding, enters the collected data into a computer program. The copies of the reports are usually discarded after completion of the entry process by the safety commission.[11]

After entry, the completed program is then made available to the DOTD and other highway and traffic agencies in the state, including parish and municipal highway engineering sections, for use in identifying areas of safety concerns (whether they be in highway design or maintenance or motorists behavior) and, when combined with highway descriptive criteria maintained by the highway departments in separate databases, in obtaining and justifying appropriate funding. Because of the high matching nature of federal-aid funding (approximately 75-90% in most cases), federal funds for any highway safety improvement are almost always sought under either § 152 or one of the other over 70 federal-aid programs. Every state, including Washington, follows a similar process, using similar forms, and making application for federal funds under the same federal-aid programs.

The beneficial use of such accident reporting forms in identifying highway safety concerns is recognized by the Federal Highway Administration and required through its

[11] In Louisiana, the larger metropolitan areas have the capacity to directly enter the data fields into a local computer program and then forward the program to the safety commission on a periodic basis.

Model Minimum Uniform Crash Criteria (MMUCC)[12] program:

> "MMUCC includes 75 minimum data elements that need to be collected by police at the crash scene and an additional 38 data elements that can be derived (11 data elements) from those that are collected at the scene or obtained by linking (27 data elements) to other data files, e.g., roadway data, injury data, etc. The total 113 data elements represent a 'model' data set which can be expanded as necessary to meet a state's specific needs."[13]

The criteria for the MMUCC is that criteria for the completion of the accident report by the investigating officer.[14] This completed accident report is the sole source

[12] The Transportation Equity Act for the 21st Century, Public Law 105-178, provided an additional and supplemental program, 23 U.S.C. § 411, to encourage states to follow uniform guidelines in collecting crash information as required under 23 U.S.C. § 402 for the implementation of the numerous federal-aid highway safety improvement programs (i.e., § 152). These guidelines are found at 23 C.F.R. § 1335.1 et seq. The Model Minimum Uniform Crash Criteria (MMUCC), found in part at Appendix B, is provided for by 23 C.F.R. § 1335.3(e). See, also, Federal Register, August 10, 2000 (Volume 65, Number 155), pages 48905-48911.

[13] See App. 7, MMUCC, August 1998, Executive Summary. See also, App. 12, MMUCC, Introduction:

> "Data recorded on crash reports are computerized into a central, electronic crash data file at the state level. These statewide motor vehicle crash databases provide the basic information necessary for developing effective highway and traffic safety programs. Data from state crash data systems are used by local, state and federal agencies to: identify and prioritize highway and traffic safety problem areas."

[14] See App. 18, MMUCC, List of Model Minimum Uniform Crash Criteria.

of the information necessary for planning, evaluating, and prioritizing highway safety improvements and justifying the applicability of federal-aid funds.

The guidelines for the MMUCC specifically note that:

> "Statewide motor vehicle traffic crash data systems provide the basic information necessary for effective highway and traffic safety efforts at any level of government – local, state or federal. State crash data are used to perform problem identification, establish goals and performance measures, determine progress of specific programs, and support the development and evaluation of highway and vehicle safety countermeasures."[15]

It should also be noted that the State of Washington's Traffic Safety Commission was involved in the development of the MMUCC guidelines.[16]

4. The accident report sought by the plaintiffs in this suit for damages is protected from discovery or other use, regardless of whether it was prepared exclusively for safety improvements or whether it is available for other uses in non-tort proceedings and regardless of whether it was prepared by highway officials or is in their custody.

There is no limiting requirement in § 409 that the information obtained by the investigating officer in completing the accident report be solely available for use by

[15] See App. 7, MMUCC, August 1998, Executive Summary.

[16] See App. 9, MMUCC, Acknowledgments.

highway officials. Nor is there any requirement that the report be compiled by highway officials. And there is no requirement that the report sought be exclusively in the custody of highway officials and not in the custody of third-parties such as local or state police.

a. The rules of statutory construction

To allow the Washington Supreme Court to create such requirements, and such requirements would need to be created as they do not exist in the language of § 409, would be to create an "anomaly" and a failure to follow the established rules of statutory interpretation.

This Honorable Court has consistently noted that in any case of statutory construction, the Court's analysis begins with an examination of the language of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999), citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Carter v. U.S.*, 530 U.S. 255, 271 (2000). And where the statute's language provides a clear answer, the analysis ends there as well. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. at 438, citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254.

In statutory interpretation, it is understood that Congress says in a statute what it means and means in a statute what it says there. *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000), citing *Connecticut National Bank v. Germain*, *supra* at 254. As a corollary, courts cannot create requirements in the statute that are not expressed and specifically should not create requirements that would contravene the clear expression of congressional intent.

Congress clearly expressed its intent in § 409 that the material collected and compiled in the furtherance of improving highway safety was not subject to use in a civil suit for damages. As this Honorable Court has noted, when Congress has intended materials and reports not to be subject to compulsory process, it has said so. See, i.e., *St. Regis Paper Co. v. U. S.*, 368 U.S. 208, 219 (1961).

b. Accident reports need not be created solely for federal reporting requirements to fall within § 409

Accident reports do not fall outside the scope of § 409 merely because they are not compiled solely for federal reporting purposes and are available for other uses.

An argument that the records of previous accidents were not protected by § 409 because accident reports had been collected by the state for many years prior to the adoption by Congress of § 409 and were available for other uses was eloquently rejected by the court in *Coniker v. State of New York*, 695 N.Y.S.2d 492 (N.Y.Ct.Cl. 7/26/99). That court noted that nothing in the language of § 409 supports the contention that it was only intended to apply in those states that were not enlightened enough to adopt such a program of data collection without the federal carrot-and-stick:

> "[I]ndeed its [§ 409] purpose – to encourage states to fully and honestly compile and analyze accident data without fear that either its conclusions or its work product would be used against it in subsequent litigation – is equally fostered regardless of whether a particular state decided to initiate such a program before or after the Federal government became involved." 695 N.Y.S.2d at 496.

Numerous other cases support this position. See, i.e., *Lusby v. Union Pacific R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993);[17] *Robertson v. Union Pacific R. Co.*, 954 F.2d 1433 (8th Cir. 1992);[18] *Powers v. CSX Transp., Inc.*, 177 F.Supp.2d 1276 (S.D. Ala. 2001);[19] *Taylor v. St. Louis Southwestern Ry. Co.*, 746 F.Supp. 50 (D. Kan. 1990);[20] and *Mackie v. Grand Trunk Western Railroad Co.*, 544 N.W.2d 709, 711 (Mich.App. 1995).[21]

This Honorable Court has faced similar situations in the past and has not based its decisions upon who prepared a specific document or in whose custody the document resided.

---

[17] "Contrary to Lusby's assertion, state materials do not fall outside the scope of § 409 merely because they are not compiled solely for federal reporting purposes and are available for other uses." *Lusby v. Union Pacific R. Co.*, *supra* at 641.

[18] "FN3. Appellants' assertion that the formula and automobile count were admissible because such information was not collected or utilized solely for federal funding projects is without merit. Although such information was available for other uses and purposes, the statute's mandatory language requires exclusion of such evidence at trial. 23 U.S.C. § 409." *Robertson v. Union Pacific R. Co.*, *supra* at 1435.

[19] "The Court agrees with those authorities holding that Section 409 does not require that the sole purpose for compilation or collection be one specified in the statute." *Powers v. CSX Transp., Inc.*, *supra* at 1278.

[20] "Given the clear mandate of Section 409, the court finds that any 'reports, surveys, schedules, lists or data' . . . whether obtained from the Kansas Department of Transportation ('KDOT'), the Kansas Corporation Commission ('KCC'), Jefferson County or Union Pacific, are inadmissible." *Taylor v. St. Louis Southwestern Ry. Co.*, *supra* at 54.

[21] "To promote these goals, a document that otherwise falls within the ambit of § 409 must be considered inadmissible even though it fulfills a state as well as a federal function." *Mackie v. Grand Trunk Western Railroad Co.*, *supra* at 711.

In *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, (1989), a contractor argued that the FOIA exemption/privilege interposed by a governmental agency was not applicable as not that agency but another had prepared or compiled the documents sought. The contractor also argued that the exemption/privilege did not apply as the documents were not originally prepared for the purpose stated in the exemption.

This Honorable Court rejected both arguments:

> "As is customary, we look initially at the language of the statute itself. The wording of the phrase under scrutiny is simple and direct: 'compiled for law enforcement purposes.' The plain words contain no requirement that compilation be effected at a specific time. The objects sought merely must have been 'compiled' when the Government invokes the Exemption. A compilation, in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents. See Webster's Third New International Dictionary 464 (1961); Webster's Ninth New Collegiate Dictionary 268 (1983). This definition seems readily to cover documents already collected by the Government originally for non-law-enforcement purposes. See *Gould Inc. v. General Services Administration*, 688 F.Supp. 689, 698 (DC 1988).
>
> "The Court of Appeals, however, throughout its opinion would have the word 'compiled' mean 'originally compiled.' See 850 F.2d, at 109. [Footnote omitted] We disagree with that interpretation for, in our view, the plain meaning of the word 'compile,' or, for that matter, of its adjectival form 'compiled,' does not permit such refinement. This Court itself has used the word

'compile' naturally to refer even to the process of gathering at one time records and information that were generated on an earlier occasion and for a different purpose. See *FBI v. Abramson*, 456 U.S., at 622, n. 5, 102 S.Ct., at 2060, n. 5; Reporters Committee, *supra*." 493 U.S. at 153-154.

As such, it does not logically follow that if the reports themselves may have been prepared by others and available for other uses that the question of their protection from discovery and use by § 409 would then be dependent upon their custodian. To hold otherwise is to place a restrictive condition upon § 409 that does not exist in the statute and impedes giving the statute its full meaning. This restrictive condition would result in § 409 being construed in a nonfunctional way.[22]

5. The federal statute (§ 409) is but one of several federal statutes that impose exact or similar discovery and evidentiary restrictions in suits in tort, and if the decision of the Washington State Supreme Court is allowed to stand, the validity of those statutes would become at issue, attacking the legitimacy of Congress to determine terms to effectuate the implementation of its programs

The provision of § 409 that the "reports, surveys, schedules, lists, or data compiled or collected" pursuant to a highway safety improvement program "shall not be

[22] *John Doe Agency v. John Doe Corp., supra* at 157: "The statutory provision that records or information must be 'compiled for law enforcement purposes' is not to be construed in a nonfunctional way."

subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages" is not unique. Several other federal statutes or regulations contain similar restrictions on either the discovery or evidentiary use of such material or reports compiled or collected pursuant to federal requirements.[23]

This Honorable Court has held such a restrictive statute to be constitutional. See *Baldrige v. Shapiro*, 455 U.S. 345 (1982), upholding 13 U.S.C. § 9(a) which provides: "Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding."

Of specific import is a similar discovery and evidentiary restriction established by 23 U.S.C. § 402, the

[23] See, i.e., 13 U.S.C. § 9(a) (census reports); 10 U.S.C. § 1102(b) and 14 U.S.C. § 645(b) (medical quality assurance records created by or for the Department of Defense); 21 U.S.C. § 360i(b)(3) (medical device user facility reports); 15 U.S.C. § 2055 (consumer product safety reports); 20 U.S.C. § 9007(b)(1) (national educational statistical reports); 33 U.S.C. § 930(c) (injury reports for longshore and harbor workers' compensation); 49 U.S.C. § 504(f) (motor carrier accident reports); 49 U.S.C. § 1154(a)(5)(b) (discovery and use of cockpit and surface vehicle recordings and transcripts); 49 U.S.C. § 1154(b) ("[n]o part of a report of the [National Transportation Safety] Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report."); 49 U.S.C. § 20703(c) (locomotive accident reports); 49 U.S.C. § 20903 (railroad carrier accident and incident reports); and 49 U.S.C. § 47507 (nonadmissibility of noise exposure map and related information as evidence).

implementing statute for Congress' highway safety programs. This statute requires that each state "*shall* have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths."

Further, § 402 provides that state programs:

> "... *shall* include but not be limited to, provisions for an *effective record system of accidents* (including injuries and deaths resulting therefrom), *accident investigations* to determine the probable causes of accidents, injuries, and deaths, ... highway design and maintenance (including lighting, markings, and surface treatment), traffic control, ... surveillance of traffic for detection and correction of high or potentially high accident locations ..." (*emphasis supplied*)

Again, as part of the trade-off for being required to collect and compile such information as part of the federal program to improve highway safety, a provision restricting the discovery and use of that information identical to § 409 is provided by § 402(k)(1):

> "Notwithstanding any other provision of law, if a report, list, schedule, or survey is *prepared by or for a State or political subdivision thereof* under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey." (*emphasis supplied*)

This statute has not been the subject of much litigation but was found to be constitutional by the federal Eastern District of Louisiana court in *Gaubert v. Denton*, *supra*.

As noted earlier, when Congress has intended materials and reports not to be subject to compulsory process, it has said so. *St. Regis Paper Co. v. U. S.*, *supra* at 219.

Congress has said so about the material sought to be discovered by the plaintiffs in this tort suit. As with the similar statutes, this explicit expression of Congress' intent should be enforced by this Honorable Court by reversing the decision of the Washington State Supreme Court.

CONCLUSION

The decision of the Washington State Supreme Court holding § 409 unconstitutional and allowing the discovery of the reports of previous accidents at this accident site should be reversed so as to give § 409 the full measure of congressional intent protecting such reports, to prevent a disparate interpretation of similar federal statutes, and to provide clear guidance on this important federal question.

Respectfully Submitted,

RICHARD P. IEYOUNG
Attorney General
JOHN C. YOUNG*
JAMES R. DAWSON
Assistant Attorneys General
626 N. 4th Street, Fifth Floor
Baton Rouge, Louisiana 70804-9095
(225) 342-8717

and

LAWRENCE A. DURANT
General Counsel, State of Louisiana, Department of Transportation and Development
P. O. Box 94245
1201 Capitol Access Road
Baton Rouge, Louisiana 70804-9245
(225) 379-1207

**Counsel of Record for Amicus Curiae*

APPENDIX A

The Proposed Amendment to Highway Safety Legislation, U.S. Department of Transportation, Federal Highway Administration, May 4, 1983, Memorandum of Marshall Jacks, Jr.

Memorandum

[LOGO]
US Department
of Transportation

Federal Highway
Administration

Date May 4, 1983

Reply to
Attn of: HSA-1.1

Subject:

Proposed Amendment to Highway Safety Legislation

From:

Associate Administrator for Safety, Traffic Engineering, and Motor Carriers

To:
HCC-1

Mr. D. L. Ivers
Chief Counsel

For the past several years, we have attempted to include in the department's legislative program a provision to protect from disclosure information compiled by States to identify and prioritize roadway hazards. It has been consistently brought to our attention that highway departments are reluctant to undertake such efforts (as required in 23 USC 152 for instance) for fear that acknowledging the existence of hazardous conditions would expose them to liability. The issue has once

more been raised, this time by the American Association of Railroads, in connection with requirements placed on them by States in identifying hazardous rail-highway crossings pursuant to Sec. 203(a) of the Highway Safety Act of 1973.

It is noted that our suggestion was included in DOT's Legislative Program for the 97th Congress, 2nd session, in the second category. We also note that highway safety legislation is being introduced in this legislative session. In the event such safety legislation receives serious consideration, it is recommended that an amendment be included to protect information compiled for purposes of safety enhancement. The following language is suggested:

> "Notwithstanding any other provision of law, no report, list, schedule or survey compiled by or for a State for the purposes of complying with any requirement of Title 23, United States Code, or the Highway Safety act of 1973 concerning the evaluation of hazardous roadway conditions or rail-highway crossings in order to plan and prioritize projects to enhance safety, shall be required to be made available under 5 USC 552 (Freedom of Information Act), or admitted to evidence or used for any other purpose in any suit or action for damages arising out of any matter mentioned in such report, list, schedule or survey."

It is the intent of this provision to prevent the unauthorized disclosure of information that States compile in good faith to meet the purposes of Federal-aid highway programs to eliminate or reduce hazardous roadway conditions. (e.g. 23 USC 152 and Sec. 203 of the Highway Safety Act of 1973). It is also the intent to protect information that may be compiled by railroads or utility companies for States in identifying hazards in connection with these programs. Precedent for such

protection is found in sec. 220(f) of the Interstate Commerce Act (49 USC 320(f), recodified as 49 USC 504(f).

We will be pleased to provide any additional assistance that may be necessary to implement this recommendation.

MARSHALL JACKS, JR.
Marshall Jacks, Jr.

APPENDIX B

Excerpts from Final Model Minimum Uniform Crash Criteria (MMUCC), U.S. Department of Transportation, National Highway Traffic Safety Administration, Federal Highway Administration, August 1998. The entire document (127 pages) can be found at http://www/nhtsa.dot.gov/people/ncsa/Codes/MinData/MMUCCaugust98.pdf.

[LOGO]

U.S. Department of Transportation

National Highway Traffic Safety Administration

Federal Highway Administration [LOGO]

FINAL

Model Minimum Uniform Crash Criteria (MMUCC)

August 1998

TABLE OF CONTENTS

Executive Summary 1

Acknowledgments 3

Introduction 4

- Background 4
- Problem 4
- Benefits of MMUCC to the Highway Safety Community 6

MMUCC Development Process 7

Development Criteria for MMUCC Data Elements .. 10

- Deciding Which Data Elements to Collect 10
- Reporting Thresholds 11
  - Background 11
  - Which Crashes Should Be Reported? 11
  - Types of Reporting Thresholds 11
  - Recommended Minimum Reporting Threshold 12

Data Linkage to Other Data Sources to Minimize Data Collection 12

- Example of a Data Linkage System 12
- Benefits of Linkage 13

Voluntary Implementation of MMUCC 14

- Potential Barriers and Their Solutions at the State Level 14
- Analysis of Current Use of MMUCC Data Elements 16

Organization of MMUCC 17

List of Minimum Uniform Crash Criteria 18

- Crash Data Elements Collected at the Scene 21
- Vehicle Data Elements Collected at the Scene 29
- Person Data Elements Collected at the Scene 41
- Crash Derived Data Elements 53
- Vehicle Linked Data Element 57
- Vehicle Derived Data Elements 57
- Person Linked Data Elements 61
- Roadway Linked Data Elements 63

GLOSSARY 72

LIST OF APPENDICES 102

- Appendix A: State and Province Codes 102
- Appendix B: Dates and Times 105
- Appendix C: Names 106
- Appendix D: Addresses 108
- Appendix E: Vehicle Damage Areas 110
- Appendix F: Violation and Conviction Codes .. 111
- Appendix G: Data Elements Useful for Data Linkage 118
- Appendix H: Diagram of Trafficway 120
- Appendix I: Definitions for Truck Configurations and Placards 121
- Appendix J: Diagram of Work Zone Area 122

* * *

Executive Summary

Statewide motor vehicle traffic crash data systems provide the basic information necessary for effective highway and traffic safety efforts at any level of government – local, state or federal. State crash data are used to perform problem identification, establish goals and performance measures, determine progress of specific programs, and support the development and evaluation of highway and vehicle safety countermeasures.

Unfortunately, the use of state crash data is often hindered by the lack of uniformity between and within states. While standards exist for collection of crash data, their use and application is inconsistent. For example, states do not collect the same information on their crash reporting forms, crash and data element definitions may differ, similar data elements may have different meanings, and/or others may have the same meanings but different values. Inconsistent data within a state, or between multiple states, can result in incorrect interpretations, thus limiting the usefulness of the information.

Many states have recently revised their crash data reporting form, and others are now in the process of doing so. Several states, during their revision process, have contacted National Highway Traffic Safety Administration (NHTSA) or Federal Highway Administration (FHWA) seeking guidance. At national meetings, there have been informal requests for national guidelines for states to use when revising crash forms or working with software vendors. The Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 required DOT to "ensure national uniform data" and to "establish minimum criteria" for reporting of highway deaths and injuries. Renewal of this legislation as the 1998 Transportation Equity Act for the Twenty First Century (TEA21) provides incentives

for states developing plans that include implementation of model data elements approved by the Secretary of Transportation.

NHTSA and FHWA are cooperating with the National Association of Governors' Highway Safety Representatives (NAGHSR) to develop model minimum uniform crash criteria (MMUCC). Development of MMUCC has been structured to obtain maximum input from all sectors of the highway safety community. Over a 20 month period, a straw model was proposed and then revised according to feedback received at meetings, via the Web, email, phone, mail, etc. before producing this final version.

MMUCC includes 75 minimum data elements that need to be collected by police at the crash scene and an additional 38 data elements that can be derived (11 data elements) from those that are collected at the scene or obtained by linking (27 data elements) to other data files, e.g., roadway data, injury data, etc. The total 113 data elements represent a "model" data set which can be expanded as necessary to meet a state's specific needs.

A study of the feasibility of implementing MMUCC evaluated the data elements collected by the 17 states providing crash data to NHTSA for its State Data System. These seventeen states are currently collecting about 60% of the 75 MMUCC data elements needing to be collected by police at the scene. And on average, they collect an additional 28 data elements not included in MMUCC.

Implementation of MMUCC will facilitate improved crash data for highway and traffic safety injury control and public health purposes at the local, state, and federal levels.

* * *

Acknowledgments

The development of the ***Model Minimum Uniform Crash Criteria (MMUCC)*** is being sponsored by the National Association of Governors' Highway Safety Representatives, the National Highway Traffic Safety Administration, and the Federal Highway Administration. Numerous state and local agencies and organizations have contributed staff to its development. The participation of the following individuals is recognized.

Frank Carlile	Florida Department of Transportation
David Dickens	Charleston West Virginia Police
Doug Donscheski	Nebraska State Patrol
Scott Falb	Iowa Department of Transportation
Rosa Gill	North Carolina State Division of Motor Vehicles
Dick Harmon	Iowa Bureau of Emergency Medical Services
Don Hillis	Missouri Department of Transportation
David Kleppe	North Dakota State Highway Patrol
David Lawrence	California Center for Childhood Injury Prevention
Lance Mathess	Ohio State Patrol
Creighton Miller	South Dakota Office of Accident Records
David Mosley	Virginia Department of Motor Vehicles
Phil Salzberg	Washington Traffic Safety Commission
Manu Shah	Maryland State Highway Administration

James Templeton	Texas Department of Public Safety
Robert Thompson	Iowa Governor's Traffic Safety Bureau
John Watson	New York State Department of Transportation
Ralph Craft	Federal Highway Administration
Dennis Flemons	National Highway Traffic Safety Administration
Carl Hayden	Federal Highway Administration
Mike Griffith	Federal Highway Administration
Janet Johnson	National Highway Traffic Safety Administration
Sandy Johnson	National Highway Traffic Safety Administration
Janet Kumer	Federal Highway Administration
Tina Morgan	National Highway Traffic Safety Administration
Ed Milton	National Highway Traffic Safety Administration
Jack Oates	National Highway Traffic Safety Administration
Barbara Rhea	National Highway Traffic Safety Administration
Jackie Schraf	National Highway Traffic Safety Administration
David Sleet	Centers for Disease Control and Prevention
Carol Tan Esse	Federal Highway Administration
Dennis Utter	National Highway Traffic Safety Administration

David Bozak	InfoGroup, Inc.
Noel Bufe	Northwestern University Traffic Institute
Charles Compton	University of Michigan Transportation Research Institute
Barbara Harsha	National Association of Governors' Highway Safetu Reps
Roy Lucke	Northwestern University Traffic Institute
Gary March	March & Associates
Matt Snyder	International Association of Chiefs of Police
Richard Pain	Transportation Research Board
Charles Peltier	International Association of Chiefs of Police
Patricia Waller	University of Michigan Transportation Research Institute

* * *

INTRODUCTION

Background

A motor vehicle crash report describes characteristics of the crash, the vehides and people (drivers, injured and uninjured occupants and injured pedestrians and bicyclists) involved. On it, the police officer also records the results of his or her investigation of the crash. By using evidence found at the scene, and by interviewing participants and witnesses the inveshgating officer may answer such questions as:

- "in what directions were the involved vehicles and pedestrians moving prior to impact?";
- "What occurred at the time of impact?"; and,
- "What factors may have contributed to the crash?"

Data recorded on crash reports are computerized into a central, electronic crash data file at the state level. These statewide motor vehicle crash databases provide the basic information necessary for developing effective highway and traffic safety programs. Data from state crash data systems are used by local, state and federal agencies to:

- identify and prioritize highway and traffic safety problem areas;
- assess the effectiveness of laws and programs intended to reduce the frequency and severity of motor vehicle crashes and injuries; and,
- assess the relationship between vehide and highway characteristics, crash propensity, and injury severity to support either the development of countermeasures or their evaluation.

At the Federal level individual crash reports also provide the basis for national crash information systems, either as the sampling frame or as a source of data. Data from these national systems are utilized in highway safety decision making by agencies at all levels of government.

Problem

Crash data lack uniformity between the states and, often, within a state. Beyond a basic set of data elements, states collect different data elements on their crash reports. Where there are similar data elements, they often have different meanings. Or the names may be the same but the attribute values vary. Within a state, local police may interpret crash element definitions differently when documenting the same type of event. Reporting thresholds for the types of traffic crash for which data are collected also differ among states and may even be implemented differently within a State.

Lack of uniform reporting makes the use and comparison of state crash data difficult. Different elements and definitions within a state can result in inconsistent data and, potentially, incorrect interpretations of data. The same is true when states have different reporting requirements and dissimilar crash data elements – accurate comparisons are difficult, and states can not draw on the experience of other states. When analyses use two or more state crash data files, results have to be examined closely to ensure that they are not due to differences in the data collected and coded by these states.

Existing national standards for collecting information about motor vehicle traffic crashes are not uniformly implemented. The *Manual on Classification of Motor*

Vehicle Traffic Accidents, the American National Standards Institute (ANSI) Standard D16.1, was developed to "promote uniformity and comparability of motor vehicle accident statistics." ANSI Standard D20.1, *Data Element Dictionary for Traffic Records Systems*, was developed to "provide a common set of coding instructions for data elements related to highway safety . . . " While the goals of these standards are to promote uniformity and comparability of motor vehicle traffic crash statistics, their use and application is inconsistent between states and even within a state.

States periodically revise their crash reporting forms. In a recent study conducted by the National Association of Governors' Highway Safety Representatives (NAG HSR) for the National Highway Traffic Safety Administration (NHTSA), eighteen states indicated that they are in the process of revising their crash reporting form, or will revise it, by 2000. Many are being spurred to do so by the availability of new technologies such as hand-held computers for data collection. Others are doing so in an effort to reduce the reporting and processing burden on state and local police agencies. Several states, during their revision process, have contacted NHTSA or the Federal Highway Administration (FHWA) to inquire as to what elements these agencies recommend to be collected on crash reporting forms. At recent national meetings and forums, traffic safety information collectors and users have asked for guidelines for states to use when revising their crash forms or when working with software vendors. The National Safety Council's (NSC) Traffic Records Committee studied the issues related to collection and use of highway safety information and issued a report entitled *A NATIONAL AGENDA for the Improvement of Highway*

Safety Information Systems. Goal VI of the National Agenda calls for establishing and promoting "technical standards of highway safety information systems." It specifically recommends promoting "the use of . . . existing standards and other recommended guidelines."

Section 2002(a) of The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) addressed the issue of collection and reporting by states of data on traffic related deaths and injuries and directed the Secretary to establish a program collecting such information from the states. It stated that, "The purposes of the program are to ensure national uniform data on such deaths and injuries and to allow the Secretary to make determinations for use in developing programs to reduce such deaths and injuries and making recommendations to Congress concerning legislation necessary to implement such programs." The section went on to say that "The Secretary shall establish minimum reporting criteria for the program;"

The traffic and highway safety communities were asked to respond to the legislative language in Section 2002(a) of the ISTEA by means of a federal regulatory notice. Responders indicated support of uniformity as a concept, but not as a federal requirement. ISTEA was renewed in June 1998 as the Transportation Equity Act for the 21st Century (TEA21). This legislation requires the Secretary of Transportation to recommend model data elements for crash reporting and provides funding incentives to states which demonstrate in a plan how they will implement them.

Benefits of MMUCC to the Highway Safety Community

Uniform criteria, if adopted by states, would assist all levels of users. The advantages of the standardized, statewide elements and definitions introduced by MMUCC include:

- Easier to support state and local highway safety programs because of more consistent and accurate data;
- Possibility for interstate comparisons and analyses;
- Improved collaboration across health and transportation sectors resulting in improved crash data for public health and injury control purposes;
- Enhanced decision making for targeting resources as part of 402, Safe Communities, etc., implementing performance measures, and evaluating program effectiveness;
- Feasibi!ty of linkage to medical outcome global positioning systems, and other highway traffic safety related data, thereby helping identify the cost of specific crash, vehicle, roadway and person characteristics and, ultimately, who pays;
- Collaborative approach so that states learn from each other by sharing their successes, identifying their common problems and working together on joint program priorities;
- Routine monitoring of emerging problems or issues as changes, such as vehicle or highway modifications, are implemented; and,
- Development of common software for crash data entry.

At the national level, comparable state data would expand NHTSA and FHWA analytical capabilities. The collection and coding of information in Federal data systems, most of which are used by state and local agencies, would improve, possibly leading to further revisions and economies in how the data are collected.

* * *

LIST OF MODEL MINIMUM UNIFORM CRASH CRITERIA

Crash Data Elements Collected at the Scene 21
C1. Crash Case Identifier 21
C2. Crash Date and Time 21
C3. Crash County 21
C4. Crash City/Place 22
C5. Crash Roadway Location 22
C6. First Harmful Event 22
C7. Location of First Harmful Event 23
C8. Manner of Crash/Collision Impact 23
C9. Source of Information 24
C10. Date and Time Crash Reported to Police Agency 24
C11. Weather Condition 24
C12. Ambient Light 25
C13. Road Surface Condition 25
C14. Contributing Circumstances, Environment .. 26
C15. Contributing Circumstances, Road 26
C16. Type of Roadway Junction 26
C17. School Bus Related 27
C18. Work Zone Related (Construction/Maintenance/Utility) 27

Vehicle Data Elements Collected at the Scene 29
V1. Vehicle Unit Number Unique to Crash 29
V2. Vehicle registration State and Year 29
V3. Vehicle License Plate Number 29
V4. Vehicle Make 29
V5. Commercial Trailer Registration State and Year 30
V6. Commercial Trailer License Plate Number 30
V7. Carrier Name 30

V8. Carrier Street Address 31
V9. Carrier Identification Number..... 31
V10. Vehicle Configuration..... 31
V11. Cargo Body Type 32
V12. Gross Vehicle Weight Rating of Power Unit 32
V13. Total Occupants In vehicle 33
V14. Vehicle Role..... 33
V15. Emergency Use..... 33
V16. Hazardous Materials Placard (Cargo Only)..... 34
V17. Hazardous Materials Released (Cargo Only)..... 34
V18. Vehicle Authorized Speed Limit 35
V19. Direction of Travel Before Crash 35
V20. Traffic Control Device Type..... 35
V21. Vehicle Maneuver/Action..... 36
V22. Point of Impact..... 36
V23. Sequence of Events..... 37
V24. Most Harmful Event for this Vehicle..... 38
V25. Direction of Force to Vehicle..... 39
V26. Underride/Override 39
V27. Most Damaged Area 40
V28. Extent of Damage..... 40

Person Data Elements Collected at the Scene 41
Level 1: All Persons Involved 41
P1. Date of Birth..... 41
P2. Sex..... 41
P3. Person Type 41
P4. Injury Status 42
Level 2: All Occupants..... 42
P5. Occupant's Vehicle Unit Number Unique to Crash..... 42
P6. Seating Position..... 42
P7. Occupant Protection System Use 43
P8. AirBag Deployed..... 43
P9. Ejection..... 44

P10. Trapped 44
Level 3: All Drivers 44
P11. Driver License State/Province 44
P12. Driver License Number 45
P13. Driver Name..... 45
P14. Contributing Circumstances, Driver..... 45
P15. Driver Condition..... 46
P16. Cited..... 46
P17. Violation Codes..... 47
Level 4: All Drivers and Non-motorists..... 47
P18. Alcohol/Drug Suspected..... 47
P19. Alcohol..... 48
P20. Drugs..... 48
Level 5: Non-motorists 49
P21. Non-motorist Number..... 49
P22. Non-motorist Type..... 49
P23. Non-motorist Action 49
P24. Contributing Circumstances, Non-motorist 50
P25. Non-motorist Condition 50
P26. Non-motorist Location Prior to Impact.... 51
P27. Non-motorist Safety Equipment 51
P28. Number of Vehicle Striking Non-motorist 52
Level 6: All Injured 52
P29. Transported to Medical facility By..... 52

Crash Derived Data Elements..... 53
CD1. Crash Severity 53
CD2. Number of Vehicles..... 53
CD3. Number of Motorists 54
CD4. Number of Non-motorists..... 54
CD5. Total Nonfatal Injuries 54
CD6. Total Fatal Injuries..... 55
CD7. Alcohol/Drug Involvement..... 55
CD8. Day of Week..... 55

Vehicle Linked Data Element 57
VL1. Vehicle Identification Number 57

Vehicle Derived Data Elements 57
VD1. Vehicle Model Year 57
VD2. Vehicle Model 57
VD3. Vehicle Body Type 58

Person Linked Data Elements 61
Level 3: All Drivers 61
PL1. Driver License Class 61
PL2. Driver License Restrictions 62
PL3. Driver License Status 62
Level 6: All Injured Persons 63
PL4. Injury Area 63
PL5. Injury Description 63

Roadway Linked Data Elements 63
RL1. Bridge/Structure Identification 64
RL2. Horizontal Alignment 64
RL3. Grade 64
RL4. Part of National Highway System 65
RL5. Functional Classification of Highway 65
RL6. Lanes 65
RL7. Annual Average Daily Traffic 66
RL8. Trafficway Description 66
RL9. Average Widths of the Shoulder(s) and Lane(s) 66
RL10. Average Width of Median 67
RL11. Access Control 67
RL12. RR Crossing ID 67
RL13. Roadway Lighting 67
RL14. Pavement Markings, Longitudinal 68
RL15. Bikeway 68
RL16. Delineator Presence 69
RL17. Intersection Type 69
RL18. Traffic Control Type at Intersection 69

RL19. Mainline Number of Lanes at Intersection 70
RL20. Side-Road Number of Lanes 70
RL21. Mainline Approach Volumes 71

Glossary 72

Supreme Court U.S.
FILED
JUL 5 2002
OFFICE OF THE CLERK

No. 01-1229

In the Supreme Court of the United States

PIERCE COUNTY,
Petitioner,
v.
IGNACIO GUILLEN, *ET AL.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF FOR PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

HUGH F. YOUNG, JR.
Product Liability Advisory Council, Inc.
1850 Centennial Park Drive
Suite 510
Reston, Virginia 20191
(703) 264-5300

KENNETH S. GELLER
Counsel of Record
JOHN J. SULLIVAN
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Amicus Curiae
Product Liability Advisory Council, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 8

I. CONGRESS HAS CONSTITUTIONAL AUTHORITY TO ENACT 23 U.S.C. § 409 WITHOUT INFRINGING THE TENTH AMENDMENT 8

A. Commerce Clause 8

B. Spending Clause 11

C. The Tenth Amendment Is No Bar To Section 409 13

II. CONGRESS' AUTHORITY TO ENACT 23 U.S.C. § 409 IS APPLIED IN MANY OTHER FEDERAL STATUTORY SCHEMES 15

A. This Court Has Long Endorsed Federal Statutes Setting Nationwide Tort Standards In Classes Of Cases In State Courts Over Which Congress Has Jurisdiction 15

B. Congress Has Enacted Numerous Statutes Shielding Information From Disclosure In State Courts 17

TABLE OF CONTENTS — Continued

Page

C. Congress Has Recently Enacted, And Is Considering Further, Legislation Preempting State Procedural Rules 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases:

Alabama Highway Dep't v. *Boone*, No. 90-1412, cert. denied, 502 U.S. 937 (1991) 3

Alden v. *Maine*, 527 U.S. 706 (1999) 14

Central Vermont Ry. Co. v. *White*, 238 U.S. 507 (1915) 15

Crowell v. *Benson*, 285 U.S. 22 (1932) 15

Dice v. *Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952) 7, 15-16

Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) 7, 15

FERC v. *Mississippi*, 456 U.S. 742 (1982) 8

Hines v. *Davidowitz*, 312 U.S. 53 (1941) 15

Hodel v. *Indiana*, 452 U.S. 314 (1981) 7, 8-9, 10

Louisville & N.R. Co. v. *Grant*, 27 S.W.2d 980 (Ky. 1930) 18

Louisville & N.R. Co. v. *Stephens*, 182 S.W.2d 447 (Ky. 1944) 18

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 10

Nevada v. *Hicks*, 533 U.S. 353 (2001) 15

TABLE OF AUTHORITIES — Continued

Page(s)

New York v. *United States*, 505 U.S. 144 (1992) 7, 13, 14

Printz v. *United States*, 521 U.S. 898 (1997) 7, 13

Reno v. *Condon*, 528 U.S. 141 (2000) 7, 13-14

Robertson v. *Union Pacific R.R. Co.*, 954 F.2d 1433 (8th Cir. 1992) 10

Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 16

South Dakota v. *Dole*, 483 U.S. 203 (1987) 7, 11-12

Testa v. *Katt*, 330 U.S. 386 (1947) 13

United States v. *Lopez*, 514 U.S. 549 (1995) 6, 8

United States v. *Smith*, 499 U.S. 160 (1991) 15

Yanick v. *Pennsylvania R. Co.*, 192 F. Supp. 373 (E.D.N.Y. 1961) 18

Constitutional Provisions and Statutes:

U.S. Const., art. I, § 8, cl. 1 ..... *passim*

U.S. Const., art. I, § 8, cl. 3 ..... *passim*

U.S. Const., art. I, § 8, cl. 18 ..... 5, 10

U.S. Const., art. VI, cl. 2 ..... 14, 15

TABLE OF AUTHORITIES — Continued

Page(s)

U.S. Const., amend. X 7, 13, 14

15 U.S.C. § 2055 ..... 1, 17

15 U.S.C. §§ 6601-6617 18

20 U.S.C. § 9007(b)(1) 17

21 U.S.C. § 360i 17

21 U.S.C. §§ 1601-1606 19

23 U.S.C. § 101(b) 8

23 U.S.C. § 121 2

23 U.S.C. § 130 3

23 U.S.C. § 144 3

23 U.S.C. § 152 ..... 3, 4, 5

23 U.S.C. § 158 ..... 11, 12

23 U.S.C. § 402 2

23 U.S.C. § 402(k)(4) 3, 9

23 U.S.C. § 409 ..... *passim*

33 U.S.C. § 930 17

45 U.S.C. §§ 51-60 15-16

TABLE OF AUTHORITIES — Continued

Page(s)

49 U.S.C. § 504 17

49 U.S.C. § 1154 18

49 U.S.C. § 20101 17

49 U.S.C. § 20703(c) 17

49 U.S.C. § 20901 17

49 U.S.C. § 20902 17

49 U.S.C. § 20903 17

49 U.S.C. § 47507 17

Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (1966) 2

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) 18-19

RCW § 47.04.050 12

RCW § 47.04.060 ..... 4, 12

Other Materials:

Class Action Fairness Act of 2002, H.R. 2341, 107th Cong. (2002) 19

H.R. 4600, 107th Cong. (2002) 19

TABLE OF AUTHORITIES — Continued

Page(s)

H.R. Rep. No. 104-246 (1995), *reprinted in* 1995 U.S.C.C.A.N. 522 4

Product Liability Reform Act of 1998, S. 2236, 105th Cong. (1998) 19

S. Rep. No. 89-1302 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2741 2

Second Annual Report on Highway Safety Improvement Programs, H.R. Doc. No. 94-366 (1976) 3

privilege, the Supreme Court of Washington repudiated this Court's precedents, developed over the last 100 years, affirming congressional authority to enact standards and rules in state court cases falling within Congress' Article I jurisdiction. In addition, the Washington court's sweeping assertion of "state sovereignty" would unduly restrict congressional jurisdiction over issues of surpassing national importance, including pending civil justice and healthcare reform measures in which PLAC's members have a substantial interest. Accordingly, PLAC submits this brief to assist the Court in defining the constitutional scope of congressional authority to include the enactment of 23 U.S.C. § 409.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case involves congressional jurisdiction over a significant issue of national transportation policy: highway safety. Since Congress enacted the Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (1966), the federal government and participating States have established a comprehensive highway safety program pursuant to standards issued by the U.S. Department of Transportation. A key feature of this program is the development and application of standards for data collection and reporting on highway safety. See 23 U.S.C. §§ 402, 409; see also S. Rep. No. 89-1302, at 1 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2741, 2741 (Highway Safety Act requires the federal government "to encourage and assist each of the States in the establishment of a highway safety program * * * [with] provisions for an effective accident record system").

States participate fully in this national highway safety program and receive funding from the federal government to improve the safety of state roads and highways. See 23 U.S.C. § 121. To receive federal funds, however, a State must certify to the Department of Transportation either "that it has in operation a computerized traffic safety recordkeeping system"

or that is has a plan "for establishing and maintaining a computerized traffic safety recordkeeping system." 23 U.S.C. § 402(k)(4).

The requirement that a State gather data identifying and evaluating accident sites and hazardous highway locations as a condition of receiving federal funds met initial resistance from States concerned about potential liability. State governments feared "legal actions resulting from accidents at these locations before an improvement c[ould] be made." *Second Annual Report on Highway Safety Improvement Programs*, H.R. Doc. No. 94-366, at 36 (1976). As a result, state and local governments were hesitant to compile the required data because "'acknowledging the existence of hazardous conditions would expose them to liability.'" Pet. Br. 3-4 (citations omitted). As the United States explained, state and local governments were "reluctant to compile detailed and accurate information about highway safety problems if there [wa]s a significant risk that the information w[ould] be used against them in actions for damages." U.S. *Amicus* Br. at 12, *Alabama Highway Dep't* v. *Boone*, No. 90-1412, cert. denied, 502 U.S. 937 (1991); *id.* at 6 (States "will likely be deterred from compiling complete and accurate information").

To address this concern and thereby increase State participation in the national highway safety program and improve the completeness and accuracy of highway safety data, Congress in 1987 enacted 23 U.S.C. § 409, which shields from disclosure the data and reports generated as a condition of receiving federal highway safety funds. The statute has been amended to expand its scope, and in its current form provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data complied or collected for the purpose of identifying, evaluating or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway/highway crossings, pursuant to Sections 130, 144, and 152 of this title, or for the purpose

> of developing any highway safety construction improvement project, which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in federal or state court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Congress amended Section 409 in 1995 to "clarify that data 'collected' for safety reports or surveys shall not be subject to discovery or admitted into evidence in Federal or State court proceedings." H.R. Rep. No. 104-246, at 59 (1995), *reprinted in* 1995 U.S.C.C.A.N. 522, 551. The provision thus includes within its scope "raw data collected prior to being made part of any formal or bound report." *Ibid.*

2. The State of Washington participates in the federal highway safety program. The Washington legislature has expressly authorized the State Department of Transportation to enter into agreements with the U.S. Department of Transportation to receive federal funds for highway improvements in the State. Pet. Br. 3; RCW § 47.04.060. And, like other States nationwide, Washington has incorporated the federal standards for collecting, recording, and reporting accident data and highway safety information "into its Administrative Code and thereby dictated procedures for all subsequent accident reports in the state." Pet. Br. 2.

Respondents in this case seek accident reports and other data compiled by the State of Washington about an intersection in Pierce County. Respondents are the guardians of four minor children who were injured in an automobile accident at the Pierce County intersection in 1996. At the time of the accident, the intersection was the subject of an application "for federal hazard elimination funds under 23 U.S.C. Section 152." Pet. Br. 7. The application "was supported by the required data from accident reports, collision diagrams and other similar material" that were collected and compiled in conformance with federal

standards. *Ibid.* The application was "submitted to and administered by the Washington State Department of Transportation" and was granted three weeks after the accident. *Id.* at 8.

Respondents sued Pierce County in state court and sought an order compelling production of the accident reports and other data about the intersection used in connection with the application for federal funds. The County invoked 23 U.S.C. § 409, which as described above protects from discovery or admission into evidence in state court proceedings any documents or data "compiled or collected" by any state or local government agency under various federal highway safety and improvement programs. The "Hazard elimination program," 23 U.S.C. § 152, under which the County applied for funds to improve the intersection where the accident occurred, obliges participating States to "conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations."

The Supreme Court of Washington affirmed an order requiring that the data and information compiled by the County be produced despite the federal privilege against production. The court concluded that Section 409 "violates the United States Constitution's federalist design * * * insofar as it makes state and local traffic and accident materials and data nondiscoverable and inadmissible in state and local courts, simply because they are *also* 'collected' and used for federal purposes." Pet. App. 4-5. The court held that neither the Spending Clause, the Commerce Clause, nor the Necessary and Proper Clause empowered Congress to create a privilege that covers preexisting materials that are compiled in connection with a federal highway safety program. According to the Washington Supreme Court, "only materials and data originally *created* for the statutorily identified federal purposes are

lawfully covered by the federal privilege and, thus, exempt from public disclosure * * *." *Ibid.* [2]

3. The Washington Supreme Court plainly erred in holding that Congress may not bar the discovery or admission into evidence in state court proceedings of information compiled by a local government in connection with a national highway safety program in which the State's executive and legislature have freely agreed to participate and have received substantial funds from the federal government to improve highway safety in the State.

Congress has a valid interest in protecting from disclosure accident report data created and compiled by state and local governments in connection with a program that seeks to improve the safety of a key "channel" of interstate commerce — our Nation's roads and highways. *United States* v. *Lopez*, 514 U.S. 549, 559 (1995). Without the shield in Section 409, state and local governments reasonably feared that such data would be used against them in litigation. Hence, either the information would not be collected or its reliability would be suspect.

Congress had at least two sources of authority to enact a provision that addressed this problem. First, under the Commerce Clause, Congress may regulate the disclosure of data generated in connection with a federal highway safety program that, as the Washington Supreme Court acknowledged, has a substantial relationship to interstate commerce. Pet. App. 103-104 ("Certainly, a sufficient nexus exists between interstate commerce and the Federal-aid highway system to justify the 'regulatory scheme when considered as a whole'") (citation omitted). Indeed, this federal program regulates a basic "channel" of interstate commerce, and Section 409 is an

[2] The Washington Supreme Court also held that respondents had standing to challenge the constitutionality of Section 409. Pet. App. 75-78.

"integral part" of the program aimed at developing reliable information on highway safety. *Hodel* v. *Indiana*, 452 U.S. 314, 328 (1981).

Second, under the Spending Clause, Congress offered the States financial incentives and benefits to participate in the federal highway safety program. One of the conditions of participation in the program was the collection of accident reporting data to identify dangerous roads and intersections. The bar on disclosure of this information is "reasonably related" to the federal program, because it is necessary to encourage state and local governments to participate and collect accurate and comprehensive information. See *South Dakota* v. *Dole*, 483 U.S. 203, 207-208 (1987).

This Court's recent cases on federalism and the Tenth Amendment, see *Printz* v. *United States*, 521 U.S. 898 (1997); *New York* v. *United States*, 505 U.S. 144 (1992), cast no doubt on the constitutionality of Section 409. This statutory provision imposes no obligation on the State of Washington to regulate its citizens or on the State legislature to enact legislation. Section 409, which was adopted to accommodate the interests of the States participating in the federal highway safety program, acts only to bar information from being disclosed in court. It "does not require the States in their sovereign capacity to regulate their own citizens." *Reno* v. *Condon*, 528 U.S. 141, 151 (2000).

Indeed, Congress' enactment of Section 409 is entirely consistent with the many federal statutes setting nationwide standards for certain classes of state tort cases — the constitutionality of which this Court has long affirmed. See, *e.g.*, *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (Price-Anderson Act); *Dice* v. *Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952) (Federal Employer's Liability Act).

ARGUMENT

I. CONGRESS HAS CONSTITUTIONAL AUTHORITY TO ENACT 23 U.S.C. § 409 WITHOUT INFRINGING THE TENTH AMENDMENT

A. Commerce Clause.

As one of the principal "channels of interstate commerce," *Lopez*, 514 U.S. at 558-559, the Nation's highways are clearly subject to regulation by Congress under the Commerce Clause. See 23 U.S.C. § 101(b) (it is "in the national interest to accelerate the construction of the Federal-aid highway systems, including the Dwight D. Eisenhower System of Interstate and Defense Highways").

Although the Washington Supreme Court acknowledged Congress' jurisdiction over the "Federal-aid highway system," the court concluded that Section 409 "cannot reasonably be characterized as an 'integral part'" of Congress' regulation of this system. Pet. App. 104-106. The court "fail[ed] to see how those vital federal purposes are reasonably served by * * * barring the discovery and admissibility in state court of routinely prepared state and local traffic and accident materials and data that would exist even had a federal safety enhancement program never been created." *Ibid.*

The standard for evaluating whether Section 409 is constitutional under the Commerce Clause is whether there is a "reasonable connection between the regulatory means selected and the asserted ends." *FERC* v. *Mississippi*, 456 U.S. 742, 754 (1982). Congressional legislation enacted under authority of the Commerce Clause "carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel*, 452 U.S. at 331-332. Moreover, it is not necessary to "show[] that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and

that the regulatory scheme when considered as a whole satisfies this test." *Id.* at 329 n.17.

On the question whether Section 409 is an "integral part" of the Federal-aid highway program, the record leaves no room for doubt. Many States would not have participated in the program, or at least the data they produced would not have been as reliable, if Congress had not provided a shield from disclosure for the data compiled in connection with the program. See pages 3-4, *supra*. Section 409 is therefore an "integral part" of the federal highway safety program. Under even the narrowest standard that could be applied, Section 409 serves the federal purpose of enhancing highway safety by promoting the collection and compilation of accurate safety data on which to base transportation policy judgments. See pages 2-3, *supra*.

There is no basis in the text of the statute or its legislative history for the distinction drawn by the Washington Supreme Court between data that "would exist even had a federal safety enhancement program never been created" and data created specifically for the federal program. Pet. App. 105. Indeed, the distinction is illusory because "in Washington, data such as police accident reports contain the information required by state regulations, and those regulations were enacted in *express compliance with the federal highway safety act*." Pet. Br. 34; see, *e.g.*, WAC § 136-28-010.

The entire premise of the federal statute is that the States were *not* collecting complete and accurate data on highway safety and that a congressional remedy was necessary to encourage each State to establish a "computerized traffic safety recordkeeping system." 23 U.S.C. § 402(k)(4). Thus, the data and other information that respondents, and similarly situated plaintiffs, seek would not exist but for the federal highway safety program. And it certainly would not exist in the computerized and easily retrievable form it does today — making for ready access to plaintiffs seeking to impose state or local government liability, which is precisely the problem

Congress sought to address. See *Robertson* v. *Union Pacific R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992) (Section 409 was designed to "facilitate candor in administrative evaluations of highway safety hazards" and "prohibit federally required record-keeping from being used as a tool in private litigation") (citations omitted).

Congress in Section 409 did not draw the distinction relied upon by the Washington Supreme Court. The federal highway safety program is premised on the notion that *all* accident data compiled for the program must be shielded from disclosure. The purported distinction drawn by the court below thus provides no basis to overcome the presumption of rationality that attaches to Section 409 under the Commerce Clause. See *Hodel*, 452 U.S. at 331-332.

Finally, whether or not Section 409 directly advances the federal purposes animating the highway safety program under the Commerce Clause, the statute can be sustained under the discretion granted to Congress by the Necessary and Proper Clause to carry out its Article I powers. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people"). The statutory goal of collecting and organizing highway safety data for policymakers is plainly within Congress' Commerce Clause powers, and thus "all means," including a shield to protect those data from disclosure in state courts, that "are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *Ibid.* The Washington Supreme Court had no basis to second-guess that congressional judgment.

B. Spending Clause.

The spending power of Article I of the Constitution provides an independent basis for sustaining Section 409. Congress may, "through the use of the spending power and the conditional grant of federal funds," achieve "objectives not thought to be within Article I's 'enumerated legislative fields.'" *Dole*, 483 U.S. at 207 (citations omitted).

As the Washington Supreme Court noted, this Court in *Dole* held that another provision of the federal highway safety program, 23 U.S.C. §158, was constitutional, "finding that conditioning receipt of federal highway funds on state enactment of minimum drinking age laws was a proper exercise of Congress' spending power." Pet. App. 85-86. The *Dole* Court suggested, however, that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" 483 U.S. at 207 (citation omitted).

Focusing on this language, the Washington Supreme Court held that Section 409 is unrelated to the federal interest in the national highway safety program (Pet. App. 92-93):

> We find that no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and "raw data" that were originally prepared for routine state and local purposes, simply because they are "collected," for, *among other reasons*, pursuant to a federal statute for federal purposes.

In so holding, the court below applied the wrong standard in deciding whether Section 409 is a constitutional exercise of Congress' spending power — focusing on whether a "valid federal interest" is "reasonably served" by Section 409. The only proper inquiry is whether the privilege against disclosing the data compiled or collected for the federal highway safety

program is "unrelated" to that program.[3] As discussed above (at pages 2-4, 9, *supra*), on that issue there can be no doubt. The privilege against disclosure in Section 409 is essential to ensure that the States participate in the federal program and that the data compiled and collected are accurate and complete.

In this case, the condition attached to the receipt of the federal funds benefitted the recipient States by relieving them of the threat of liability posed by production of accident data. By providing that protection, Congress encouraged States to take part in the federal program and to produce reliable safety data. The "condition" in Section 409 is therefore directly "related" to the federal highway safety program and a constitutional exercise of Congress' spending power. At the end of the day, it is for each State to decide whether to accept the conditions attached to federal highway safety funds.[4] There is no unconstitutional imposition on the States by Congress.

---

[3] The test for "relatedness" is not rigorous. In *Dole*, the Court upheld the constitutionality of a condition on federal highway safety funds (23 U.S.C. § 158) that required participating States to adopt a uniform minimum drinking age of 21. 483 U.S. at 211-212. The Court found that the condition was "related to one of the purposes for which highway funds are expended — safe interstate travel," *id.* at 208, even though the provision was vastly "over-inclusive because it stops teenagers from drinking even when they are not about to drive on interstate highways." *Id.* at 214-215 (O'Connor, J., dissenting).

[4] The Washington legislature expressly "assent[ed]" by statute to the "terms and conditions" of the federal highway safety program, RCW 47.04.060, and directed that the State "shall act in the manner provided by state law * * * so far as the same may be consistent with the provisions of * * * acts of Congress." RCW 47.04.050. Thus, as a matter of state law, Washington has adopted the terms and conditions of the federal highway safety program, including the privilege set forth in Section 409.

C. The Tenth Amendment Is No Bar To Section 409.

Citing this Court's recent Tenth Amendment cases, *Printz* v. *United States*, 521 U.S. 898 (1997), and *New York* v. *United States*, 505 U.S. 144 (1992), the Washington Supreme Court nonetheless asserted that Section 409 is an unconstitutional violation of "state sovereignty." Pet. App. 108-112. But the Tenth Amendment poses no barrier to Section 409, which creates a federal privilege to shield information in state courts and is applied by state courts as a matter of federal law under the Supremacy Clause. *Testa* v. *Katt*, 330 U.S. 386 (1947).

This Court in *New York* reviewed a federal statute under which "Congress commandeered the state legislative process by requiring a state legislature to enact a particular kind of law." *Condon*, 528 U.S. at 149. "The Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162 (citation omitted).

In *Printz*, the Court invalidated a provision of the Brady Act that required "State and local law enforcement officers to conduct background checks on prospective handgun purchasers." 521 U.S. at 902. "The Federal government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.* at 935.

Section 409 is fundamentally different from these statutes that encroach on state sovereignty. First, as noted above, the privilege in Section 409 is not mandatory. The States are free to accept or reject it, depending on whether they want federal highway funds. The statutes in *Printz* and *New York* were mandatory directives to the States.

Second, like the Driver's Privacy Protection Act ("DPPA") at issue in *Reno* v. *Condon*, which "regulate[d] the disclosure and resale of personal information contained in the records of

state DMVs," 528 U.S. at 143, Section 409 "does not require the States in their sovereign capacity to regulate their own citizens." *Id.* at 151. In *Condon*, the Court upheld the constitutionality of the DPPA against a Tenth Amendment challenge, finding that the statute only "regulate[d] the States as the owners of data bases." *Ibid.* Section 409 is even less intrusive, giving the States a choice to adopt federal standards governing the collection and disclosure of accident data and information. Moreover, neither the DPPA nor Section 409 requires a state legislature "to enact any laws or regulations," and neither statute requires "state officials to assist in the enforcement of federal statutes regulating private individuals." *Ibid.*

Third, Section 409 is not directed at the actions of state executive officials or legislators; it is simply a federal evidentiary privilege to be applied in state courts by state judges, if the State decides to participate in the federal highway safety program. As this Court held in *Alden* v. *Maine*, 527 U.S. 706, 752 (1999) (citations omitted), "[a]lthough Congress may not require the legislative or executive branches of the States to enact or administer federal regulatory programs," Congress may "require state courts * * * 'to enforce federal prescriptions, insofar as those prescriptions relate to matters appropriate to the judicial power.'"

The Supremacy Clause requires this result, mandating that the "Laws of the United States * * * Shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. As this Court observed in *New York*, "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." 505 U.S. at 178-179.

Just as the Supremacy Clause preempts state laws that conflict with federal law by "standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 53, 67 (1941), so too state evidentiary rules must give way to the privilege created by Section 409, which is an essential element of the carefully crafted federal highway safety program.

II. CONGRESS' AUTHORITY TO ENACT 23 U.S.C. § 409 IS APPLIED IN MANY OTHER FEDERAL STATUTORY SCHEMES

A. This Court Has Long Endorsed Federal Statutes Setting Nationwide Tort Standards In Classes Of Cases In State Courts Over Which Congress Has Jurisdiction.

Section 409 preempts only a tiny sliver of state law in an exceedingly narrow class of state court cases, yet Congress has cut a much wider swath in other areas of state tort law. For nearly a century, this Court has reviewed and consistently found constitutional the many federal statutes setting nationwide tort standards for certain broad classes of cases brought in state court. See, *e.g.*, *Duke Power*, 438 U.S. at 84 (Price-Anderson Act); *Dice*, 342 U.S. at 361 (Federal Employer's Liability Act); *Crowell* v. *Benson*, 285 U.S. 22, 47 (1932) (Longshoremen's and Harbor Workers' Compensation Act); see also *Nevada* v. *Hicks*, 533 U.S. 353, 368 (2001) (comparing the Federal Employees Liability Reform and Tort Compensation Act of 1988 with the Price-Anderson Act); *United States* v. *Smith*, 499 U.S. 160, 172-173 (1991) (explaining the Federal Employees Liability Reform and Tort Compensation Act of 1988).

This Court has repeatedly upheld the constitutionality of federal preemption of state procedural rules by the Federal Employer's Liability Act, 45 U.S.C. §§ 51-60 ("FELA"). See *Central Vermont Ry. Co.* v. *White*, 238 U.S. 507, 512 (1915). In *Dice*, 342 U.S. at 361, for example, the Court considered

whether a judge or a jury would decide an issue related to a fraud claim. Ohio procedural rules required the trial judge to decide the issue, but under FELA the plaintiff had a right to a jury trial. *Id.* at 363. This Court held that FELA rather than the state rule applied, because "a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act."*Id.* at 361. Thus, the state court could not apply state procedural law because FELA gave the plaintiff a right to a jury trial, which "play[s] an important part in the federal Act's administration." *Id.* at 362.

Under this Court's decisions, therefore, Congress has the authority to enact legislation preempting state procedural rules in state tort actions, in support of a federal interest. Even if "Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is * * * where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (availability of punitive damages under state law is not in conflict with the federal remedial scheme in the Price-Anderson Act).

In this case, Section 409 preempts generally applicable state rules on discovery and evidence that conflict with the goal of the congressional program of developing reliable statistical data on highway safety nationwide. As described above, disclosure of these data in state courts would discourage state and local governments from producing the information or would make the information less reliable. Therefore, preemption of state disclosure rules directly promotes the federal highway safety program — over which there is unquestioned congressional jurisdiction under the Commerce and Spending Clauses. This Court's many decisions affirming the authority of Congress to legislate broad tort rules applicable in state court necessarily endorse the far narrower provision in this case.

B. Congress Has Enacted Numerous Statutes Shielding Information From Disclosure In State Courts.

Following this Court's precedents, Congress has exercised its authority to enact numerous discovery rules similar to Section 409 that limit or regulate disclosure in state courts. See, *e.g.*, 20 U.S.C. § 9007(b)(1) (prohibiting disclosure in "any action, suit or other judicial or administrative proceeding" of any "individually identifiable information" collected as part of a program on national education statistics); 49 U.S.C. § 504 (excluding from discovery any reports on accidents involving motor carriers); 49 U.S.C. § 47507 (limiting admission into evidence of noise exposure data submitted to the Secretary of Transportation); Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 930 ("Any report * * * [regarding injury or death] shall not be evidence of any fact stated in such report in any proceeding in respect of such injury or death on account of which the report is made"); Consumer Product Safety Act. 15 U.S.C. § 2055 (limiting discovery of consumer product safety reports); 21 U.S.C. § 360i (limiting discovery of medical device user facility reports).

There has been a particularly strong tradition limiting disclosure of information in pursuit of federal safety policies in the railroad industry. For example, Congress has restricted discovery of accident reports filed by railroads to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. As part of this program, "[n]o part of an accident or incident report filed by a railroad carrier under section 20901 of this title or made by the Secretary of Transportation under section 20902 of this title may be used in a civil action for damages resulting from a matter mentioned in the report." 49 U.S.C. § 20903. See also 49 U.S.C. § 20703(c) (excluding from discovery in state courts investigatory reports related to railroad accidents). "The purpose of the act in requiring a monthly report of accidents to be submitted to the Interstate Commerce Commission [now the Secretary of Transportation] was to afford the [Secretary] an

opportunity to investigate such accidents, and no doubt the admissions of the reports as evidence was prohibited in order to encourage prompt and full reports of all accidents resulting in injury to persons." *Louisville & N.R. Co.* v. *Grant*, 27 S.W.2d 980, 984 (Ky. 1930) (construing an earlier statute with substantially similar language, 45 U.S.C. § 41 (1910)); See *Yanick* v. *Pennsylvania R. Co.*, 192 F. Supp. 373, 377 (E.D.N.Y. 1961) (the statute encourages railroads to investigate accidents by eliminating the threat that the data collected will be used against them at trial); *Louisville & N.R. Co.* v. *Stephens*, 182 S.W.2d 447, 457 (Ky. 1944) ("It is expressly provided by the statute that reports of accidents to the [Secretary of Transportation] shall not be admitted in evidence for any purpose in any action for damages growing out of any matter mentioned therein.").

Yet another federal statute limits discovery of National Transportation Safety Board investigations of commercial aircraft accidents, including cockpit and surface vehicle recordings and transcripts, as well as reports related to the accident. See 49 U.S.C. § 1154 ("No part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.").

C. Congress Has Recently Enacted, And Is Considering Further, Legislation Preempting State Procedural Rules.

In light of the foregoing precedents, Congress has recently enacted several statutes — and is currently considering a number of other initiatives — that depend on its ability to preempt state court procedural rules when necessary to achieve an important federal objective. For example, the Y2K Act of 1999, 15 U.S.C. §§ 6601-6617, applies federal pleading requirements, notice of claims provisions, and burdens of proof in civil actions in state court based on Y2K failures. See also Securities Litigation Uniform Standards Act of 1998, Pub. L.

No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.) (prohibiting certain actions from proceeding as class actions and authorizing federal courts to stay discovery in state courts in certain cases); Biomaterials Access Assurance Act of 1998, 21 U.S.C. §§ 1601-1606 (regulating motions to dismiss and for summary judgment in certain classes of state court litigation).

The current Congress is now considering the Class Action Fairness Act of 2002, H.R. 2341, 107th Cong. (2002), which would "amend the procedures that apply to consideration of interstate class actions." The bill provides, among other things, for procedural requirements for any settlement in "[a]ny court with jurisdiction over a plaintiff class action," including state courts. *Ibid.* In addition, several health care reform proposals, see, *e.g.*, H.R. 4600, 107th Cong. (2002), address the evidence that may be introduced in any health care related lawsuit, including suits arising in state courts.[5] Many aspects of these important federal legislative proposals would be cast into doubt by the expansive view of "state sovereignty" adopted by the court below.

* * * * *

The minimal intrusion of Section 409 into the realm of state procedure and evidence to support an important federal safety program — over which Congress has, as all concede, Article I jurisdiction — is not unconstitutional. All of the foregoing legislative programs, including the longstanding tort statutes whose constitutionality has been sustained by this Court and the numerous limitations on disclosures related to safety, support the assertion of congressional authority in this case.

Untethered assertions of "state sovereignty" cannot undermine Section 409. The State of Washington agreed to

---

[5] See also Product Liability Reform Act of 1998, S. 2236, 105th Cong. (1998) (bill proposed to regulate statutes of limitations and repose in certain product liability actions arising under state law).

participate in the federal highway safety program, and Congress adopted Section 409 to accommodate the interest of the States in avoiding public disclosure of the information sought by the federal government. No state sovereignty has been impugned. If Congress cannot make this modest alteration of state procedure — to *benefit* the States at their *request* — then many other federal statutes, including some whose constitutionality has been upheld by this Court, would be subject to the same challenge. The Constitution neither compels nor tolerates that result.

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted.

HUGH F. YOUNG, JR.
Product Liability Advisory Council, Inc.
1850 Centennial Park Drive
Suite 510
Reston, Virginia 20191
(703) 264-5300

KENNETH S. GELLER
Counsel of Record
JOHN J. SULLIVAN
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Amicus Curiae
Product Liability Advisory Council, Inc.

JULY 2002

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
Allegiance Healthcare Corporation
Altec Industries
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Ansell Healthcare, Inc.
Appleton Papers, Inc.
Aventis Pharmaceuticals Inc.
BASF Corporation
Baxter International, Inc.
Bayer Corporation
Beretta U.S.A. Corp.
BIC Corporation
Biro Manufacturing Company Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Bombardier Recreational Products
BP Amoco Corporation
Bridgestone/Firestone, Inc.
Briggs & Stratton Corporation
Bristol-Meyers Squibb Company
Brown and Williamson Tobacco
Brown-Forman Corporation
Brunswick Corporation
Caterpillar Inc.
Centerpulse USA Inc.
Chevron Corporation
Compaq
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation

Dana Corporation
Deere & Company
E&J Gallo Winery
E.I. DuPont de Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
ExxonMobil Corporation
FMC Corporation
Ford Motor Company
General Electric Company
General Motors Corporation
Georgia-Pacific Corporation
GlaxoSmithKline
GLOCK, Inc.
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Harsco Corporation, Gas & Fluid Control Group
Honda North America, Inc.
Hyundai Motor America
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls Inc.
Joy Global Inc.
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Holdings, Inc.
Mazda (North America), Inc.
McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.

Michelin North America, Inc.
Miller Brewing Company
Mitsubishi Motors R&D of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
Otis Elevator Company
PACCAR Inc.
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Philip Morris Companies Inc.
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Sears, Roebuck and Co.
Shell Oil Company
Siemans Corporation
Smith & Nephew, Inc.
Snap-on Incorporated
Sofamor Danek, Medtronic Inc.
Solutia Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Sunbeam Corporation
Synthes (U.S.A.)
Textron Inc.
The Boeing Company
The Dow Chemical Company
The Goodyear Tire & Rubber Company
The Heil Company

The Proctor & Gamble Company
The Raymond Corporation
The Sherwin-Williams Company
The Toro Company
Thomas Built Buses, Inc.
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Whirlpool Corporation
Wilbur-Ellis Company
Wyeth
Yamaha Motor Corporation, U.S.A.
Zimmer, Inc.

(15)

Supreme Court U.S.
FILED
JUL 5 2002
OFFICE OF THE CLERK

NO. 01-1229

IN THE
SUPREME COURT OF THE UNITED STATES

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, AS LEGAL GUARDIAN FOR JENNIFER GUILLEN AND ALMA GUILLEN, MINORS; AND MARIANO GUILLEN, AS LEGAL GUARDIAN FOR PAULINA GUILLEN,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF WASHINGTON

BRIEF OF THE STATES OF WASHINGTON, ALASKA, FLORIDA, HAWAII, ILLINOIS, INDIANA, MARYLAND, NEVADA, OHIO, OREGON, PENNSYLVANIA, UTAH, VERMONT, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS AS AMICI CURIAE IN SUPPORT OF PETITIONER

CHRISTINE O. GREGOIRE
Attorney General
William Berggren Collins*
Michael E. Tardif
Sr. Assistant Attorneys General
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100
(360) 753-6245
**Counsel of Record for Amici Curiae*
Additional Counsel Listed Inside

31 pp

Bruce M. Botelho
Attorney General of Alaska

Robert A. Butterworth
Attorney General of Florida

Earl I. Anzai
Attorney General of Hawaii

James E. Ryan
Attorney General of Illinois

Steve Carter
Attorney General of Indiana

J. Joseph Curran, Jr.
Attorney General of Maryland

Frankie Sue Del Papa
Attorney General of Nevada

Betty D. Montgomery
Attorney General of Ohio

Hardy Myers
Attorney General of Oregon

D. Michael Fisher
Attorney General of Pennsylvania

Mark L. Shurtleff
Attorney General of Utah

William H. Sorrell
Attorney General of Vermont

Robert Tenorio Torres
Attorney General of the
Commonwealth of the Northern
Mariana Islands

TABLE OF CONTENTS

INTEREST OF THE AMICI 1

STATEMENT 2

SUMMARY OF ARGUMENT 10

ARGUMENT 11

1. Congress Had The Power To Enact § 409Under The Spending Clause 12

2. The Washington Supreme Court Based Its Decision On A False Premise—That Highway Safety Data Is Collected For An Independent State Purpose 18

3. Section 409 Is Limited To Achieving The Federal Purpose 21

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Coniker v. New York
695 N.Y.S.2d 492, 181 Misc. 2d 801 (Ct. Cl. 1999) 20

Duncan v. Union Pacific R.R. Co.
790 P.2d 595 (Utah Ct. App. 1990) 13, 16

Gregory v. Ashcroft
501 U.S. 452 (1991) 11

Guillen v. Pierce County
144 Wash. 2d 696, 31 P.3d 628 (2001) 15, 18, 19, 21

Harrison v. Burlington Northern R.R. Co.
965 F.2d 155 (7th Cir. 1992) 13

Light v. New York
560 N.Y.S.2d 962 , 149 Misc. 2d 75 (Ct. Cl. 1990) 13

McCluskey v. Handoff-Sherman
882 P.2d 157 (Wash. 1994) 16

New York v. United States
505 U.S. 144 (1992) 12

Palacios v. Louisiana & Delta R.R. Inc.
740 So. 2d 95 (La. 1999) 13, 22

Robertson v. Union Pacific R.R. Co.
954 F.2d 1433 (8th Cir. 1992) 13, 22, 23

Ruff v. County of King
887 P.2d 886 (Wash. 1995) 15

South Dakota v. Dole
483 U.S. 203 (1987) 12

Southern Pacific Transp. Co. v. Yarnell
890 P.2d 611 (Ariz. 1995) 14

Tanguma v. Yakima County
569 P.2d 1225 (Wash. Ct. App. 1977) 16

Tardy v. Norfolk Southern Corp.
659 N.E.2d 817 (Ohio Ct. App. 1995) 14

Wiedeman v. Dixie Elec. Membership Corp.
627 So. 2d 170 (La. 1993) 14

Constitutional Provisions

Const. art. I., § 8, cl.1 12

Statutes

23 U.S.C. § 130 ..... 1, 2

23 U.S.C. § 144 ..... 1, 2

23 U.S.C. § 152 ..... 1, 3, 7, 9, 12

23 U.S.C. § 152(a) 2

23 U.S.C. § 152(b) 3

23 U.S.C. § 152(d) 3

23 U.S.C. § 402 3

23 U.S.C. § 402(k)(1) 20

23 U.S.C. § 403 3

23 U.S.C. § 409 ..... *passim*

Wash. Rev. Code § 42.17.270 22

Regulations

23 C.F.R. 924.9(a)(1) 7

23 C.F.R. 924.9(a)(2) 7

Wash. Admin. Code § 136-28-010. 20

Wash. Admin. Code § 136-28-020 21

Wash. Admin. Code § 136-28-030 21

Rules

Rule 37.4 1

Other Authorities

33 Fed. Reg. 16337, 16339, Nov. 7, 1968 5

33 Fed. Reg. 16560-16564, Nov. 14, 1968 5

4 Transportation Research Board, National Research Council, *Selected Studies In Highway Law, Liability For Failure To Comply With Guidelines* 1966-N24 to 1966-N29 (Ross D. Netherton ed. 1991) 16

Roy Jorgensen & Assoc., *Evaluation Of Criteria For Safety Improvements On The Highways: A Report To The United States Department of Commerce, Bureau Of Public Roads, Office Of Highway Safety* (1966) 4

United States Department of Transportation Federal Highway Administration, *1996 Annual Report On Highway Safety Improvement Programs* (Apr. 1996) 2

United States Department of Transportation Federal Highway Administration, *Highway Safety Review: Report Of The Safety Review Task Force To The Federal Highway Administrator* (Dec. 1978) 6, 7

United States Department of Transportation Federal Highway Administration, *The 1988 Annual Report On Highway Safety Improvement Programs* (Apr. 1988) 6

United States Department of Transportation National Highway Traffic Safety Administration, *Highway Safety 1984: A Report On Activities Under The Highway Safety Act Of 1966* (1984) 6

United States Department of Transportation National Highway Traffic Safety Administration, *Highway Safety Research, Development, And Demonstration: Conference Proceedings* (Dec. 1979) 3

United States Department of Transportation National Highway Traffic Safety Administration, *Safety '71, A Report On Activities Under The [1966] Highway Safety Act* (1971) 5, 6

United States Secretary of Transportation, *Second Annual Report On Highway Safety Improvement Programs, Through June 30, 1975* (House Document No. 94-386, 1976) 7, 8

William E. Kenworthy, *Kuhlman's Killer Roads From Crash to Verdict* (2d ed. 1999) 14, 16, 17, 18, 22, 23

INTEREST OF THE AMICI

Washington and the other amici states have two important interests in the issues presented in this case.[1] First, the states have an interest in preserving the federalist structure of the United States Constitution. The Constitution created a Federal Government of limited powers, and states retain substantial sovereign authority. States have a compelling interest in ensuring that the Federal Government does not encroach on state sovereignty by expanding its power beyond that granted by the Constitution. The states also have a substantial interest in preserving the opportunities for federal-state partnerships that exist under the federalist structure of the Constitution.

Second, all of the amici states operate extensive systems of highways and roads—including bridges and railroad crossings The states have a vital interest in improving the safety of these highway facilities to protect their citizens from death and injury. The Federal Government shares this interest. This common interest in highway safety has resulted in a federal-state partnership to improve the nation's highway facilities.

Under 23 U.S.C. §§ 130, 144, and 152 states perform engineering surveys and compile extensive data to identify needed safety improvements to their highway facilities. Based on this information, the Federal Government provides grants to fund these improvements. Another aspect of this federal-state partnership is 23 U.S.C. § 409, which prohibits use of the information collected by the states as evidence that a highway was defective and that the state had notice of the defect. This federal-state partnership has achieved its goals. For example, between 1974 and 1996 the hazard elimination

---

[1] This brief is submitted by the Attorneys General of the amici states pursuant to Rule 37.4.

program helped prevent more than 26,500 deaths and 760,000 nonfatal injuries, and the rail-highway crossing program helped prevent more than 8,500 fatalities and 38,900 nonfatal injuries.[2]

Washington and the other amici states participate in this federal-state partnership for highway safety. The decision of the Washington State Supreme Court declaring part of 23 U.S.C. § 409 unconstitutional jeopardizes the partnership by removing liability protection for participating states.

STATEMENT

The Washington Supreme Court's ruling in this case is based on its conclusion that there is no valid federal interest in barring discovery and admissibility of data collected for purposes of the federal highway safety program. In fact, the reason states collect this data is to participate in the federal program. This is demonstrated both by the structure of the program and the history of the federal government's effort to get states to provide the accident information necessary to analyze highway safety.

Under 23 U.S.C. § 152(a) each state "shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations . . . and establish and implement a schedule of projects for their improvement".[3] Based on this information, the Secretary of

[2] United States Department of Transportation Federal Highway Administration, *1996 Annual Report On Highway Safety Improvement Programs, Pub. No. FHWA-SA-96-040*, at IV-5 (Apr. 1996). This was the last annual report.

[3] 23 U.S.C. §§ 130 and 144 establish similar programs to eliminate hazards of railway-highway crossings and to replace and rehabilitate bridges

the Department of Transportation may approve projects and pay 90 percent of the cost thereof. 23 U.S.C. § 152(b), (d).

The information compiled under 23 U.S.C. § 152 is required by federal—not state—law. Federal law requires states to precisely locate each accident and sets out the data that the states are required to collect. These federal requirements have developed over the last three decades.

Prior to 1966 there was no federal program for highway safety. In 1946 President Truman called the first President's Highway Safety Conference. The conference produced an action program but responsibility "for implementation was left to the voluntary action of the states. The voluntary action program failed to produce adequate results[.]"[4]

In 1966 Congress enacted the landmark Highway Safety Act of 1966. The Highway Safety Act had two distinct purposes. The first was an action program. 23 U.S.C. § 402 "authorized the establishment of national highway safety standards . . . and required the states to design programs to implement these and a system of federal grants to the states was initiated to help support these programs".[5] The second purpose was to establish a research and development program.[6] 23 U.S.C. § 403 authorized the Secretary of the Department of Transportation to "engage in research on all phases of highway safety and traffic conditions".

[4] United States Department of Transportation National Highway Traffic Safety Administration, *Highway Safety Research, Development, And Demonstration: Conference Proceedings (Final Report)* 3 (Dec. 1979).

[5] *Id.* at 4.

[6] *Id.* at 6.

While Congress was considering the bill that became the Highway Safety Act, the Bureau of Public Roads did a comprehensive study of the elements needed for a new national highway safety capital improvement program. Roy Jorgensen & Assoc., *Evaluation Of Criteria For Safety Improvements On The Highways: A Report To The United States Department of Commerce, Bureau Of Public Roads, Office Of Highway Safety* (1966) (*Jorgensen Report*). The Jorgensen Report set out a detailed plan for identifying hazardous locations on existing roads and for analyzing the effectiveness of proposed improvements. A major part of the report reviewed the suitability of using existing state accident record systems to identify hazardous locations.

The Jorgensen Report concluded "that the existing body of knowledge on accident casual [sic] factors is sadly deficient". Jorgensen Report at 93. Although states kept accident records, they were of little use for highway safety because the records "related primarily to provisions of law requiring maintenance of data for possible legal proceedings or determinations of financial responsibility". *Id.* at 94. In other words, state accident records were collected for limited purposes "not related to the determination of accident causal factors". *Id.* According to the Report, an effective highway records system required "[u]niform, complete and accurate accident reports, stored in one center in every State, subject to rapid retrieval and analysis, and compatible with a national record system at the Federal level". *Id.*

The Jorgensen Report recommended to the Bureau of Public Roads that the Federal Government require each state to develop a comprehensive accident record system. *Id.* at VIII. The report also recommended that accurate and standardized information on accident locations, highway features, accident causation, and injuries would identify hazardous locations needing safety improvements. *Id.* at VII, 102-108.

In 1967 the National Highway Safety Bureau of the United States Department of Transportation (successor to the Bureau of Public Roads) issued sixteen Uniform Standards for State Highway Safety Programs. 33 Fed. Reg. 16337, 16339, Nov. 7, 1968; 33 Fed. Reg. 16560-16564, Nov. 14, 1968. Standards Nos. 9 and 10 required the states to create programs to identify and correct high-accident locations and to create a traffic records system which included accident records containing accident locations, accident "type", description of injuries, description of environmental conditions, and "causes and contributing factors". The requirements of Standards 9 and 10 were closely related to the recommendations of the Jorgensen Report.

The 1967 Standards inaugurated a several decades long effort by the Federal Government to create state accident records, and computerized systems to process them, which contained comprehensive, accurate, and detailed information on accident locations, injuries, causes, and roadway features. A 1971 Department of Transportation report on activities under the Highway Safety Act reported the progress on developing state traffic records systems during the first five years under Standards 9 and 10. One significant problem identified by the report was that "State and local agencies are still inhibited in the use of data exchange because each has had to develop traffic records systems with data elements, codes, formats, and documentation unique to their internal systems. Thus a 'data wall' is created in the interchange of information." United States Department of Transportation National Highway Traffic Safety Administration, *Safety '71, A Report On Activities Under The [1966] Highway Safety Act* 37 (1971) (*Nat'l Safety '71 Report*). To solve this problem, "NHTSA developed reference and guidance documents for both traffic records systems concept and detailed data uniformity"—the

State Traffic Records Systems Design Manual. *Nat'l Safety '71 Report* at 37.

In 1978 the Federal Highway Administration conducted a comprehensive nationwide highway safety review. This review indicated that compliance with the 1967 federal standards remained imperfect. According the report, the "lack of accident data seriously hampered many of the reviews in the 22 States". United States Department of Transportation Federal Highway Administration, *Highway Safety Review: Report Of The Safety Review Task Force To The Federal Highway Administrator* 7 (Dec. 1978) (*Fed. Safety '78 Report*). For example, two states "could only produce a general fatality rate for the sections of roadway under review. No specific information on accident type or location was available." *Fed. Safety '78 Report* at 7. Five other states "provided accident data printouts for the review, but because of either lack of location data or information on collision type, analysis was impossible". *Id.* According to the report, no state "had analyzed the performance of the safety features on their highways using accident data". *Id.*

As time passed, states did make progress in meeting federal standard for accident reports. By 1984, fifty-five states and territories had implemented computerized accident files; by 1988, all states had accident location reference systems for all interstates and state highways, and thirty-one states had such systems for all roads, with the remaining states not having location systems for accidents on local roads. United States Department of Transportation National Highway Traffic Safety Administration, *Highway Safety 1984: A Report On Activities Under The Highway Safety Act Of 1966*, at 9 (1984) (*Nat'l Safety '84 Report*); United States Department of Transportation Federal Highway Administration, *The 1988 Annual Report On Highway Safety Improvement Programs* 18 (Apr. 1988) (*Fed. Safety '88 Report*).

The process for gathering highway safety information became even more important when 23 U.S.C. § 152 was enacted as part of the Highway Safety Act of 1973, Pub. L. No. 93-87 (Aug. 13, 1973). Prior to the Act of 1973, the states used most federal highway construction funds for major construction work, usually on the new interstates and had not been funding many individual safety improvement projects. United States Secretary of Transportation, *Second Annual Report On Highway Safety Improvement Programs, Through June 30, 1975*, at 1 (House Document No. 94-386, 1976) (*Second Annual Report*). But this interstate construction did not address a major highway safety problem because over 90 percent of annual highway fatalities were on non-Interstate routes. *Fed. Safety '78 Report* at 109.

The Act of 1973 responded to the shortcomings of the existing highway safety program by providing federal funding "for the first time exclusively for safety improvements and for improvements off the Federal-aid highway system". *Second Annual Report* at 1. The major reorientation of the federal highway safety programs to funding of specific safety improvements on non-federal roads created a greater need to use accident reports, and analysis of those reports, to determine when improvements should be funded and the priority of those improvements. The Act of 1973 required a state records system that would enable "retrieval of accident data by location, by highway data, by type of accident, or other characteristic". *Second Annual Report* at 34. The implementing regulations for the Act of 1973 specifically required that states plan highway safety improvements "on the basis of accident experience or accident potential" and that states collect and maintain a record of highway accident data. 23 C.F.R. 924.9(a)(2), (1).

The Highway Safety Act of 1973 created an immediate tort liability problem for the states. The federal requirement that the states have accident reports which were

accurately location-coded to state and local roads and which contained detailed highway, accident causation, and injury data lead to claims of state liability for roads which had not been improved. The *Second Annual Report* on the Act of 1973 noted the serious problem caused for the states by using accident reports to create a system to identify publicly "hazardous locations" on older state and local roads.

> "A few States are very concerned about the confidentiality of identified high-hazard locations because of legal actions resulting from accidents at these locations before an improvement can be made. A few States expressed strong objection to the Federal Highway Administration's releasing their last year's annual report which listed high-hazard locations. The public has access to the States' reports under the Freedom of Information Act." *Second Annual Report* at 36.

The state tort liability problem created by the Act of 1973 was ameliorated by the enactment of 23 U.S.C. § 409 in 1987, which now provides as follows:

> "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled *or collected* for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data." 23 U.S.C. § 409 (emphasis added[‡]).

[‡]In 1995 the words "or collected" were added to § 409.

This case illustrates how § 409 was intended to operate. In 1995 and 1996, Pierce County applied for federal funds to make major safety improvements to an existing intersection. Joint Appendix (JA) J (Third Declaration of Thomas Ballard, County Engineer). The county sought up to $180,000 in federal funds from the federal hazard elimination program created by 23 U.S.C. § 152, part of the Highway Safety Act of 1973. JA G (Declaration of Wayne Gruen, Deputy Assistant Secretary, Washington State Department of Transportation). The purpose of the funds was to make capital improvements to 0.66 miles of county road including installation of "a fully actuated traffic signal" and "concrete barrier curb-gutter and sidewalk at the four corners of the intersection". *Id.* The application for federal safety improvement funds required the county to collect reports of prior accidents at the intersection, to analyze them, and to provide an accident history sufficient to support the design of the improvement and the request for federal funding. JA J.

While the county's funding application was pending, respondent Ignacio Guillen's spouse caused a major accident at the intersection, resulting in her death and claims by her surviving husband and several children who were in the vehicle. JA J. After approval of the county's application for § 152 funds, Guillen filed a tort suit against the county claiming that the county "owed a duty to the plaintiffs to have a [sic] traffic control at the intersection". JA C. Guillen made public record requests and discovery requests to the county for the analyses, accident history, and accident reports which had been used to make the application for federal safety improvement funds. JA A, H. The county denied the public records and discovery requests under § 409 because

the documents had been collected and created by the county for purposes of obtaining federal highway safety improvement funds. JA B, K.

SUMMARY OF ARGUMENT

The federal highway safety program—including § 409—is a valid exercise of Congress' power under the Spending Clause of the United States Constitution. States collect highway safety data required by the federal government and, in return, the federal government pays for local highway improvements. The program is designed to fix the most dangerous road hazards first, so accurate data and candid assessments of local road hazards are critical to the success of the program.

The Washington Supreme Court held that extending § 409 to data "collected" under the federal highway safety program does not bear a reasonable relationship to the purpose of the federal spending. This conclusion is mistaken. Section 409 is a critical part of the program because it eliminates the use of the data in tort actions against the state. Without § 409, states would be less candid—and might even choose not to participate in the program. The reason is that highway safety data is extremely damaging to a state in a tort action. This is so for two reasons. First, it can be used to show that the state had notice of a defect and did not correct it. Second, the information may have the effect of actually expanding state tort liability. As a rule, state law limits liability for failure to improve or reconstruct old roads. Courts recognize that it is not fiscally possible for a state to improve all its old roads. This can change if a plaintiff can point to a specific section of road that the state, itself, has identified as hazardous. Section 409 is related to the federal interest because it eliminates the disincentive to provide accurate data and candid evaluations.

The Washington Supreme Court held that there was no valid federal interest because it concluded that § 409 applied to data originally collected for state and local purposes. This holding is based on a false assumption—that accident data was originally collected for state and local purposes. In fact, the only reason states collect highway safety data is to participate in the federal highway safety program. There was never an independent state or local purpose. The Washington Supreme Court's error on this point destroys the basis for its holding that § 409 is not reasonably related to a valid federal purpose.

Section 409 is also limited in its scope. It applies only to discovery or admissibility of data in an action for damages arising from any occurrence at a location mentioned in the reports and data. Section 409 does not prohibit discovery or use of the information for another purpose. In addition, § 409 does not limit a plaintiff's ability to present other relevant evidence that was not collected for purposes of the highway improvement program.

ARGUMENT

The Washington Supreme Court ruled that the 1995 amendment to § 409 was beyond the power delegated to Congress by the United States Constitution. It is true that the "Constitution created a Federal Government of limited powers". *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). However, in this case the federal highway safety program—including § 409—falls easily within Congress' spending power. The Washington Supreme Court's decision striking down § 409 is based on a false premise—that highway safety data is collected for an independent state purpose. In fact, prior to the federal highway safety program, states collected little or no accident data. The data collected today is required by federal law.

1. Congress Had The Power To Enact § 409 Under The Spending Clause

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States". Const. art. I., § 8, cl.1. Congress' power under the spending clause is subject to four restrictions. First, "the exercise of the spending power must be in pursuit of 'the general welfare.'" *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Second, if "Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation". *Id.* Third, any conditions on federal grants must "bear some relationship to the purpose of the federal spending". *New York v. United States*, 505 U.S. 144, 167 (1992). Finally, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds". *Dole*, 483 U.S. at 208.

The federal highway safety program—including § 409—does not violate any of these restrictions. Federal spending for highway safety promotes the general welfare and the provisions in 23 U.S.C. §§ 152 and 409 unambiguously set out Congress' conditions for receipt of the funds. Moreover, there is no independent constitutional bar to imposing conditions on federal dollars for the highway safety program.

The Washington Supreme Court held that extending § 409 to data "collected" under 23 U.S.C. § 152 did not bear a reasonable relationship to the purpose of the federal spending. This conclusion is mistaken.

Under 23 U.S.C. § 152, states provide information required by the Federal Government identifying hazardous roads. In return, the Federal Government helps pay to

improve the roads. For the program to work, it is vital that states participate and that they provide accurate information. Section 409 is directly related to this purpose. Although this Court has not considered the purpose of § 409, lower federal and state courts agree that it is designed to "facilitate candor in administrative evaluations of highway safety hazards" and "prohibit federally required record-keeping from being used as a tool in private litigation". *Robertson v. Union Pacific R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992). *See also Harrison v. Burlington Northern R.R. Co.*, 965 F.2d 155, 160 (7th Cir. 1992); *Palacios v. Louisiana & Delta R.R. Inc.*, 740 So. 2d 95, 98 (La. 1999); *Duncan v. Union Pacific R.R. Co.*, 790 P.2d 595, 597 (Utah Ct. App. 1990); *Light v. New York*, 560 N.Y.S.2d 962, 149 Misc. 2d 75, 79-80 (Ct. Cl. 1990).

Allowing the collection of federally required data to be used against a state or local government would undercut candor and perhaps even participation. This case is a good example. Pierce County sought $180,000 to make improvements on 0.66 miles of county road. JA G. Based on the information the county developed to support its request for federal funds, respondent now seeks damages which could involve millions of dollars. Without the protection of § 409, state and local governments might be more concerned with future lawsuits than with providing accurate detailed information to the Federal Government.

Section 409 protects state participation and candor by eliminating the use of data collected for federal purposes in tort actions against the state. Section 409 does this in two ways.

First, the collection of data for accidents at specific locations might be very damaging to a state defendant in a tort action because it can be used to show that the state had notice of the defect. A leading plaintiff's treatise on highway

liability, *Kuhlman's Killer Roads From Crash to Verdict* explains:

> "One of the crucial disputed issues in virtually every crash case, under case law or statute, is whether the defendant had sufficient notice of the defect at issue before the plaintiff's crash to be held liable for a lapse in due care for not making timely corrections that would, more probably than not, have prevented the plaintiff's injuries. Without this notice, defendants can use the chronological defense, cited earlier, that it would go bankrupt if it were required to constantly upgrade all of its road miles or crossings." William E. Kenworthy, *Kuhlman's Killer Roads From Crash to Verdict* 149 (2d ed. 1999).

Kenworthy also counsels that highway authorities should be reviewing highway accident data and that such data provides notice of a hazard to be remedied, citing to several of the Federal Highway Administration directives and publications which established the highway improvement programs after the Highway Safety Acts of 1966 and 1973. Kenworthy at 161-62, 176-78.

The use of accident histories and records in tort litigation to establish the critical element of notice of a highway hazard also explains the importance of the 1995 amendment to § 409. Several state cases before 1995 had held that § 409 protected analyses and safety studies done by highway agencies but not the disclosure of the "raw data" (mostly accident histories and reports) collected to prepare those analyses and reports. *See Wiedeman v. Dixie Elec. Membership Corp.*, 627 So. 2d 170 (La. 1993) (accident reports); *Tardy v. Norfolk Southern Corp.*, 659 N.E.2d 817 (Ohio Ct. App. 1995) (accident reports); *Southern Pacific Transp. Co. v. Yarnell*, 890 P.2d 611 (Ariz. 1995) (location

review and safety upgrade plan for rail crossings). Congress amended § 409 to protect this raw data.

The purpose of the amendment to § 409 was to "clarify that *data 'collected' for safety reports or surveys* shall not be subject to discovery or admitted into evidence in Federal or State court proceedings. H.R. Rep. 104-246 § 328, at 59 (1995) (emphasis added); *see* Act of Nov. 28, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N. (109 Stat.) 591." *Guillen v. Pierce County*, 144 Wash. 2d 696, 723, 31 P.3d 628 (2001).

> "*This clarification is included in response to recent State court interpretations of the term 'data compiled' in the current section 409 of title 23.* It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such data." *Guillen*, 144 Wash. 2d at 723.

Thus, a major effect of the 1995 amendment was to protect highway agencies from claims that their collection of accident reports and other safety-related data put them on notice of hazardous conditions which required correction.

There is a second way in which § 409 protects states from the adverse impact of collecting highway safety information. If the information was used, it would have the effect of expanding state tort liability. Under Washington law, highway authorities are generally not liable if they cannot make improvements to all older highway facilities that could be made safer by capital improvements. There is no duty for "a county to update every road and roadway structure to present-day standards". *Ruff v. County of King*, 887 P.2d 886 (Wash. 1995) (installing guardrail on older

road); *McCluskey v. Handoff-Sherman*, 882 P.2d 157 (Wash. 1994) (installing median barrier on older road); *Tanguma v. Yakima County*, 569 P.2d 1225 (Wash. Ct. App. 1977) (repiacing old narrow bridge). The law in most states is similar to Washington. *See generally* 4 Transportation Research Board, National Research Council, *Selected Studies In Highway Law, Liability For Failure To Comply With Guidelines* 1966-N24 to 1966-N29 (Ross D. Netherton ed. 1991).

State law limits liability for failure to improve or reconstruct older facilities because, as the Utah Court of Appeals observed, highway "maintenance and improvement are predominantly fiscal matters. Every highway could probably be made safer by further expenditures, but we will not hold UDOT (and implicitly, the legislature) negligent for having to strike a difficult balance between the need for greater safety and the burden of funding improvements." *Duncan*, 790 P.2d at 601. Kenworthy, in *Kuhlman's Killer Roads*, also recognizes that under traditional state law, it is difficult for plaintiffs to prevail in cases where the plaintiff's theory is not that the road was negligently designed, signed, or maintained, but that the road should have been improved to a newer and safer standard.

> "A defendant charged with negligently designing, building, or maintaining a transportation facility can generally argue, with a great deal of support, that in order to meet its particular burden of reasonable care, it need only satisfy the design and safety criteria, if any, existing in the distant past when the facility was created. . . .
>
> ". . . .
>
> "These defense arguments, bolstered by common sense and authoritative literature, are obviously very powerful. Judges and juries are not likely to hold a defendant to a standard of care that would inevitably force it into bankruptcy and ruin, and the inescapable fact is that few defendants could afford to upgrade all their facilities to current safety levels." Kenworthy, at 7-8.

According to Kenworthy, for plaintiff to prevail he or she "must show that prior to plaintiff's accident, the particular facility involved in his case should have been upgraded to meet a higher standard of care that would have prevented the crash". *Id.* at 9. To make this case, Kenworthy counsels that the "plaintiff must gather all the available evidence of prior crashes, complaining letters, recommendations for improvement, applicable safety statutes, governmental warnings, crash rates, death rates, and anything else establishing that the dangers of this particular facility should have been 'red flagged' to the defendant before the plaintiff was injured". *Id.* The purpose of this evidence is to single out the location of the plaintiff's accident.

> "If the fact finder accepts this singling out of the facility at issue, the defendant will lose much of the 'common sense' force behind its argument that it would be financially destroyed if required to constantly upgrade all of its facilities after they are built. *The same evidence establishing that the defendant should have upgraded this particular dangerous facility, of course, will then simultaneously establish that the defendant was negligent in not making such improvements and also that the defendant's negligence should be measured against the design and safety standards existing at the time the defendant should have upgraded the facility.*" Kenworthy at 9-10.

Kenworthy specifically refers to the accident record-keeping requirements of the federal highway safety programs as one of the best ways for a plaintiff to create a duty for state and local government to make capital improvements to older roads. Kenworthy at 8, 161-62, 176-78.

The federal Highway Safety Acts expanded state liability because they created a comprehensive system to identify sections of existing roads for safety-related capital improvements. The detailed accident reports and computerized accident report systems required by the federal acts have had the effect of giving continuous notice to highway authorities of "hazardous" or "defective" roads and, as noted in the excerpt from Kenworthy, the notice of a hazard on a road creates the implication of a duty to improve the facility to a newer and safer design. Thus, one of the results of the Highway Safety Acts has been to assist plaintiffs in avoiding common state tort defenses which limit liability for failure to improve or reconstruct, as distinguished from repair or maintain, capital facilities.

The § 409 privilege for accident reports, and other "raw" safety data collected to implement the Highway Safety Acts, does not interfere with traditional state tort liabilities for design, maintenance, and signing of highways. Instead, § 409 prevents the requirements of the Highway Safety Acts from being used to create or expand state liability for alleged lack of capital safety improvements on older roads.

2. The Washington Supreme Court Based Its Decision On A False Premise—That Highway Safety Data Is Collected For An Independent State Purpose

The Washington Supreme Court ruled that the 1995 amendment to § 409 violated the spending clause. *Guillen*, 144 Wash. 2d at 734-37. The court concluded that there was no valid federal interest in barring discovery and

admissibility in state court "of accident reports and other traffic and accident materials and 'raw data' that *were originally prepared for routine state and local purposes,* simply because they are 'collected' for, among other reasons, federal purposes pursuant to a federal statute". *Guillen*, 144 Wash. 2d at 737 (emphasis added).

The holding of the Washington Supreme Court rests on its assumption that accident materials and raw data were originally prepared for "routine state and local purposes". *Id.* This assumption is wrong. Accident materials and raw data were not collected for routine state and local purposes. They were collected to comply with federal requirements in the highway safety program.

The origin of the current use of accident reports in highway safety programs is evident from an examination of federal regulations and various Congressional reports and administrative materials related to the development of the federal program for improvements to older highways.

Before the Highway Safety Act of 1966, state accident reports were not related to highway safety but were used for a variety of non-highway uses, such as financial responsibility. Moreover, these records were not kept in statewide databases but were kept by various agencies for their specific purposes. As a result of the Highway Safety Act of 1966, states were required to perform detailed coding of accident reports by location, highway features, accident causes, and injuries. The Act of 1966 also required the states to put the accident records in comprehensive computerized databases so the records could be sorted by location, highway features, and accident causes.

The Highway Safety Program Standards issued by the National Highway Safety Bureau in 1967 required states to have programs which used the new highway information in accident reports and the new databases to identify and correct

"high accident locations". The Highway Safety Act of 1973 advanced the federal safety program further by requiring each state to have a specific highway safety program to make safety improvements to existing roads. The Act of 1973 and its implementing regulations required that the funding and priority of state highway improvements be driven by location, accident, and highway feature data derived from the federally-mandated accident record databases. In 1984, Congress added 23 U.S.C. § 402(k)(1) which provided specific funding for states to establish and maintain "comprehensive computerized safety recordkeeping system[s] designed to correlate data regarding traffic accidents, drivers, motor vehicles and roadways". The state accident data collection and analysis which is required for each state's Highway Safety Improvement Program is also federally funded. *See Coniker v. New York*, 695 N.Y.S.2d 492, 181 Misc. 2d 801 (Ct. Cl. 1999).

The Washington Supreme Court overlooked Washington law that provides that all accident reports for county roads must be processed under the requirements of the federal Highway Safety Act of 1966. The Washington County Road Administration Board adopted administrative rules in 1968 which provide, in part, as follows:

> "In order to implement the requirement of the National Highway Safety Act of 1966 that requires all states, in cooperation with their various local governments, to collect, compile and make reports to the National Highway Safety Bureau of Accident Statistics in each state [Washington State Patrol], the county road administration board has acted to coordinate the activities of the county engineers and the state patrol. Each county engineer is to cooperate in this effort by following the procedure outlined below." Wash. Admin. Code § 136-28-010.

The Board's rules provide that county road engineers must analyze and code all county road accident reports for the records section of the State Patrol which has maintained[7] the accident database required by the Act of 1966. *See* Wash. Admin. Code §§ 136-28-020, -030.

The utility of accident reports in tort litigation against highway authorities derives from the coding and computerization of accident reports for federal highway safety purposes. The public records and discovery requests in this case were for the computerized list of accidents for a particular location on a Pierce County roadway and for copies of all the accident reports which appeared on that list. This information is available only because the federal highway safety acts required the states to use accident reports with detailed location and highway feature coding and maintain them in comprehensive computer databases so that hazardous highway locations could be identified.

The Washington Supreme Court failed to examine the nature of the current accident report system and simply assumed that accident data was collected for state and local purposes. This assumption is wrong, and the court's error destroys the basis for its conclusion that the 1995 amendment to § 409 is not reasonably related to a valid federal purpose.

3. Section 409 Is Limited To Achieving The Federal Purpose

The Washington Supreme Court incorrectly assumed that accident data is collected for state and local purposes and was troubled by its belief that the 1995 amendment to § 409 "effectively creates a legal black hole into which state and local governments can drop virtually all accident materials and facts". *Guillen*, 144 Wash. 2d at 724. The court's

---

[7] This function has subsequently been transferred to the Washington State Department of Transportation.

concern about the scope of § 409 is misplaced. Section 409 prohibits the use of certain information for certain purposes.

In the first place, § 409 prohibits only discovery or admissibility "in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data". Thus, the purpose of § 409 is limited. For example, Washington has a broad public disclosure law, Wash. Rev. Code § 42.17.270. Section 409 would not prohibit a newspaper in Washington from requesting highway data to do a story on the highway safety. However, § 409 would prohibit a plaintiff from using the newspaper story based on the highway data in a damages action. *See Robertson*, 954 F.2d at 1435 ("Appellants are not entitled to introduce evidence of otherwise inadmissible data simply because it is reported by an indirect, secondary source.").

In addition, § 409 applies only to reports and data collected "pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds". While § 409 does protect accident reports due to their critical role in the highway safety program, this does not prevent litigating tort cases without use of that data. Under state law, accident reports are generally inadmissible as hearsay. *Kenworthy*, at 261-67. The reports sometimes can have an indirect use, such as refreshing the recollection of a witness, but the usual evidence in an accident case is testimony from witnesses. *Id.*

Section 409 does not prevent a plaintiff from presenting a normal tort liability case through the testimony of parties, witnesses, investigating officers, and engineering experts, and through evidence of highway design or signing standards. *See Palacios*, 740 So. 2d at 102 ("The plaintiff is at liberty to investigate, examine and present other relevant

evidence, so long as such evidence was not compiled or collected for purposes of federal highway improvement programs."); *Robertson*, 954 F.2d at 1435 ("the expert witness was able to form an opinion and testify in court, without relying upon any data provided by the AHD").

In this case, respondents seek to use accident reports because "by gathering evidence about numerous accidents occurring at this intersection, plaintiffs are trying to establish that the county had notice of the hazardous condition and failed to make improvements". *See* Pl.'s Mem. Compel at 14. This is the use which is made of accident reports in tort litigation, and it is a use arising from the role that accident reports play in the highway safety program. *See* Kenworthy at 161-62, 176-78.

Thus, § 409 is not a "black hole" in which states can hide information. Instead, it is a law that facilitates the federal highway safety program by eliminating the disadvantage to states that provide accurate, candid information about road hazards so roads can be improved to reduce those hazards.

CONCLUSION

The decision of the Washington Supreme Court should be reversed.

Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General

William Berggren Collins*
Michael E. Tardif
Sr. Assistant Attorneys General

1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100
(360) 753-6245

Counsel of Record for Amici Curiae

July 5, 2002

No. 01-1229

Supreme Court, U.S.
FILED
AUG 9 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

PIERCE COUNTY, a municipal corporation,

Petitioner,

vs.

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF AMICUS CURIAE WASHINGTON STATE TRIAL LAWYERS ASSOCIATION FOUNDATION IN SUPPORT OF RESPONDENTS

DEBRA L. STEPHENS*
6210 E. Lincoln Lane
Spokane, WA 99217
(509) 465-5702
**Counsel Of Record*

GREGG L. TINKER
101 Stewart Street,
Ste. 1010
Seattle, WA 98101
(206) 447-9640

BRYAN P. HARNETIAUX
517 E. 17th Avenue
Spokane, WA 99203
(509) 624-3890

GARY N. BLOOM
P.O. Box 1461
Spokane, WA 99210
(509) 624-4727

Date: August 9, 2002

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

34PP

TABLE OF CONTENTS

	Page
IDENTITY AND INTEREST OF AMICUS CURIAE ...	1
INTRODUCTION AND STATEMENT OF THE CASE ...	1
ISSUE PRESENTED ...	4
SUMMARY OF ARGUMENT ...	4
ARGUMENT ...	6
1) Washington Law Requires That Motor Vehicle Accident Reports Be Prepared And That Information And Materials From These Reports Be Collected And Analyzed For State Purposes, And Further Provides That Some Of This Information Is Discoverable In Tort Litigation ...	6
2) §409 Provides A Narrow Privilege Confined To Eliminating The "Silver Platter" Effect As To Information And Materials Compiled Or Collected Solely For Federal Purposes Pursuant To Federal Law ...	13
3) The Black Hole Specter: The Co-Mingling Of §152 Information And Materials With Those Gathered For Non-§152 Purposes In A Single Electronic Database Should Not Insulate Non-§152 Information And Materials From Discovery Under §409 ...	26
CONCLUSION ...	29

TABLE OF AUTHORITIES

Page

CASES

Coniker v. New York, 695 N.Y.S.2d 492 (N.Y. Ct. Cl. 1999) 21

CSX Transp. v. Easterwood, 507 U.S. 658 (1993) 14, 22

Dept. of Transp. v. Superior Court (Tate), 55 Cal. Rptr.2d 2 (Cal. App. 1996) 15, 18

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 13

Guillen v. Pierce County, 982 P.2d 123 (Wash. App. 1999), *aff'd on other grounds*, 31 P.3d 628 (Wash. 2001) ..... *passim*

Irion v. State, 760 So.2d 1220 (La. Ct. App.), *writ denied*, 773 So.2d 727 (La. 2000) 15, 17

Isbell v. State, 9 P.3d 322 (Az. 2000) 23

John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989) 24, 25

Kitts v. Norfolk & Western Ry. Co., 152 F.R.D. 78 (S.D.W.Va. 1993) 15, 16, 17, 23

Light v. State of New York, 560 N.Y.S. 2d 962 (N.Y. Ct. Cl. 1990) 21

Lusby v. Union Pac. R.R., 4 F.3d 639 (8th Cir. 1993) 18

Mackie v. Grand Trunk Western R. Co., 544 N.W.2d 709 (Mich. App. 1996) 18

Norfolk So. R. Co. v. Shanklin, 529 U.S. 344 (2000) 22

Palacios v. Louisiana & Delta R.R. Inc., 740 So.2d 95 (La. 1999) 17, 21

TABLE OF AUTHORITIES – Continued

Page

Raygor v. Regents of Univ. of Minn., 534 U.S. 533 (2002) 13

Reichert v. Dept. of Transp., 694 So.2d 193 (La. 1997) 24

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 13

Robertson v. Union Pac. R.R., 954 F.2d 1433 (8th Cir. 1992) 18, 23

Southern Pac. Transp. Co. v. Yarnell, 890 P.2d 611 (Az. 1995) 15, 22, 23

Tardy v. Norfolk S. Corp., 659 N.E.2d 817 (Oh. App. 1995) 22

United States v. Nixon, 418 U.S. 683 (1974) 13

Wiedeman v. Dixie Elec. Mem. Corp., 627 So.2d 170 (La. 1993), *cert. denied*, 511 U.S. 1127 (1994) 23, 24

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

23 U.S.C. §152 ..... *passim*

23 U.S.C. §152(a) 12

23 U.S.C. §402(k) 27

23 U.S.C. §402(k)(1) 16

23 U.S.C. §409 ..... *passim*

Act of November 18, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N. (109 Stat.) 568 22

Ch. 46.52 RCW 11, 12

Ch. 308-330 WAC 11

Pub. L. No. 93-87, 87 Stat. 282 11

TABLE OF AUTHORITIES – Continued

Page

RCW 36.78.070 12
RCW 46.52.030 8
RCW 46.52.030(1) 9
RCW 46.52.030(2) 9
RCW 46.52.060 ..... 9, 10, 11
RCW 46.52.070 ..... 8, 12
RCW 46.52.070(1) 9
RCW 46.52.080 9
RCW 46.90.005-.010 11
RCW 47.04.050-.080 12
U.S. Const. Art. I §8, Cls. 1, 3, 18. 3
WAC 136-28-010 ..... 6, 12
WAC 136-28-010-030 12
WAC 446-85-010. 8
Wash. Laws 1937, ch. 189, §§133-40 11
Wash. Laws 1937, ch. 189, §138 11

OTHER

H.R. Rep. 104-246 §328 (1995) 23, 24

IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation has an interest in the rights of injured persons seeking legal redress, including rights affected by interpretation and application of federal statutes limiting discovery or admissibility of evidence in state court proceedings. WSTLA Foundation appeared as amicus curiae in this case before the Washington Supreme Court. Letters from both parties and the United States granting consent to the filing of this amicus curiae brief are on file with the Court.[1]

INTRODUCTION AND STATEMENT OF THE CASE

The issues before the Court involve the preemptive scope of 23 U.S.C. §409 and the constitutionality of its 1995 amendment. This case arises out of a motor vehicle accident occurring at an intersection maintained by Petitioner Pierce County (or "the County"). Respondent

[1] Pursuant to Rule 37.6, amicus curiae WSTLA Foundation discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than amicus curiae, its members, or its counsel, make a monetary contribution to the preparation or submission of this brief, *except that* WSTLA funds the amicus program operated by WSTLA Foundation, and the Spokane, Washington law firms of Winston & Cashatt, P.S. and Delay, Curran, Thompson, Pontarolo & Walker, P.S., donate certain clerical services and materials for operation of the program, including services and materials used in preparation of this brief.

Ignacio Guillen et al. (Guillen) contends that the County failed to erect proper traffic controls at the intersection in question. *Guillen v. Pierce County*, 982 P.2d 123, 127 (Wash. App. 1999), *aff'd on other grounds*, 31 P.3d 628 (Wash. 2001).

In two separate proceedings, one a statutory action seeking public records and the other a common law tort action, Guillen sought information and materials about the accident history of the intersection, particularly accident reports. The County urged that such data and reports were privileged under 23 U.S.C. §409 because they were compiled or collected for the purpose of a highway hazard elimination program governed by 23 U.S.C. §152.

The trial court in each action ordered the County to produce certain information and materials. *Guillen*, 982 P.2d at 126-27. On review, the Washington court of appeals affirmed for the most part, concluding that none of the information and materials requested, except one document, were compiled or collected for §152 purposes, and thus were not subject to §409. *Id.* at 130.

The County sought review in the Washington Supreme Court of those portions of the court of appeals' opinion adverse to it, also renewing a claim, not addressed by the court of appeals, that the accident reports at issue were not subject to disclosure or discovery under state law. *Guillen*, 31 P.3d at 633-35, 637. The Washington Supreme Court accepted review.

The Washington Supreme Court held that the accident reports and certain accident history sought by Guillen were generally discoverable under state law. *Id.* at 637-40 & ns. 7-8. A 5-justice majority of the court found the otherwise discoverable information and materials

subject to the §409 privilege, concluding that the 1995 amendment, adding the "or collected" language, was intended to sweep broadly and protect information and materials regardless of their source or location, and regardless of whether they were also collected for non-§152 purposes. *Id.* at 640-46. The majority rejected the notion, pivotal to the court of appeals analysis, that each source must be analyzed separately under §409, with only those state agencies collecting information and materials for §152 purposes allowed to assert the claim of privilege. *Id.* at 645-46. The court found this approach "unsound and unworkable given the fact that such legal distinctions are already being rendered meaningless by the electronic revolution underway." *Id.* at 646.

Having expansively interpreted the 1995 amendment to §409, the majority court proceeded to find the amendment an unauthorized intrusion on state sovereignty. It concluded:

> Congress fundamentally lacks authority to intrude upon state sovereignty by barring state and local courts from admitting into evidence or allowing pretrial discovery of routinely created traffic and accident related materials and 'raw data' created and held by state and local governments and essential to the proper adjudication of claims brought under state and local law, simply because such collections *also* serve federal purposes.

Id. at 655. The majority found the 1995 amendment unjustified under the Spending Clause, Commerce Clause or Necessary and Proper Clause of the United States Constitution. *See* U.S. Const. Art. I §8, Cls. 1, 3, 18. It

remanded for determination of what information and materials were compiled for §152 purposes. *Id.* at 656.

A 3-justice concurrence of the Washington Supreme Court narrowly construed the 1995 amendment to §409, limiting its reach to only those state sources that generate §152 work product. *Id.* at 656-59 (Madsen J., concurring). It found this approach resolved the constitutional infirmity recognized by the majority under its expansive view of the 1995 amendment.

This amicus brief urges a narrow construction of §409, as amended in 1995, consistent with its text and purpose. The proposed construction fully resolves the constitutional issues before this Court, as Guillen does not appear to challenge application of §409 to information and materials compiled or collected solely for §152 purposes. *See* Guillen Br. in Opp. to Cert. at 1, 15 n.5, 18-19.

ISSUE PRESENTED

What is the proper interpretation of 23 U.S.C. §409?

SUMMARY OF ARGUMENT

23 U.S.C. §409 establishes a narrow privilege designed by Congress to prevent states from being disadvantaged in tort litigation because of information gathering and reporting activities required as a condition for receiving federal funds. §409 exempts from discovery or admission into evidence only information and materials that would not exist but for a state's participation in federal highway safety programs, *i.e.*, that which is compiled or

collected *solely* for the purpose of federal highway safety enhancement pursuant to 23 U.S.C. §152 (or for the other specified statutory purposes). The §409 privilege should be so limited to avoid the "silver platter" effect that would otherwise obtain as to work product generated by reason of a state's participation in federal highway safety programs.

Under this interpretation, §409 is in the nature of a work product privilege that protects information and materials "compiled" for §152 purposes in the formal or bound reports, surveys, schedules, etc. required under this section, as well as those "collected" for such purposes, when not embodied in §152 compilations. It does not shelter information and materials generated for other purposes, even if those purposes coincide with or overlap §152 purposes. Nor are information and materials initially compiled or collected for state purposes "federalized" when later compiled or collected for §152 purposes. It is the purpose for which the information and materials are gathered that is determinative, not whether the particular agency or source from which the plaintiff seeks discovery is involved in §152 activity.

This narrow purpose-based reading of §409 is compelled by the text and rationale of the statute, consistent with both federal preemption analysis and the strict construction given to evidentiary privileges. A broader interpretation far exceeds §409's limited design, and renders Washington tort victims worse off in pursuing long-standing state remedies, by sheltering accident history that otherwise exists irrespective of Washington's participation in federal highway safety programs. It also raises serious doubts as to the constitutionality of the

statute, a question addressed in other briefing before the Court.

With respect to the United States' argument regarding the gathering of information and materials in a single electronic database, used for both federal and state purposes, §409 does not shelter the entire database. The burden remains on the party asserting §409's protection to specifically identify which information and materials contained therein are compiled or collected solely for federal purposes.

ARGUMENT

1) Washington Law Requires That Motor Vehicle Accident Reports Be Prepared And That Information And Materials From These Reports Be Collected And Analyzed For State Purposes, And Further Provides That Some Of This Information Is Discoverable In Tort Litigation.

In forwarding its interpretation of 23 U.S.C. §409 and supporting its constitutionality, Pierce County and amici curiae State of Washington et al. assert that the only reason accident history and accident reports are gathered by Washington State is in furtherance of federal highway safety programs such as 23 U.S.C. §152. At one point Pierce County argues "data such as police accident reports contain the information required by state regulations, and those regulations were enacted in *express compliance with the federal highway safety act*. *See e.g.* WAC §136-28-010." Pet. Br. at 34; *see also id.* at 46. Washington State et al. amici, in criticizing the Washington State Supreme Court's

interpretation of §409, contend that states only collect accident data for federal purposes:

> The holding of the Washington Supreme Court rests on its assumption that accident materials and raw data were originally prepared for 'routine state and local purposes'. This assumption is wrong. Accident materials and raw data were not collected for routine state and local purposes. They were collected to comply with federal requirements in the highway safety program.

Washington State et al. Amicus Br. at 19 (citation omitted). These amici further assert that "[b]efore the Highway Safety Act of 1966, state accident reports were not related to highway safety but were used for a variety of non-highway uses, such as financial responsibility." *Id.*[2]

In response to these assertions, this brief first establishes that, since at least 1937, the type of accident history and accident reports sought in this case have been required to be gathered under Washington State law, for highway safety and other purposes, independent of any §152 mandate. Moreover, under Washington law, some of this information is generally available to tort litigants.

---

[2] Pierce County and two amici also make a related argument. They assert that, because federal highway safety program statutes and regulations require participating states to collect certain accident history information and encourage the use of uniform accident report forms, all state data and reports must be deemed compiled or collected for §152 purposes. *See* Pet. Br. at 43; Washington State et al. Amicus Br. at 19-20; Louisiana State Amicus Br. at 14-17. This argument is addressed *infra*, §§2 & 3.

Curiously, in their characterization of Washington State law, Pierce County and Washington State et al. amici overlook longstanding state statutory law requiring that accident history and accident reports be compiled and collected for state purposes. They make no reference to that portion of the Washington Supreme Court's opinion below that recognizes this statutory scheme in upholding generally the discoverability under state law of certain accident history and accident reports required by Washington law. *See Guillen*, 31 P.3d at 637-40 & ns. 7-8 (upholding discovery of particular information and materials requested under civil discovery rules and state public records act).

Washington law has long required written accident reports to be filed for any motor vehicle collision resulting in injury or death, or causing property damage in excess of a minimum amount, currently seven hundred dollars. RCW 46.52.030, .070; WAC 446-85-010. Parties to the accident must file a report, unless one is made by a law enforcement officer. RCW 46.52.030. This same statute requires that the accident report form be devised by the chief of the Washington State Patrol (WSP), and that the form:

> shall call for sufficiently detailed information to disclose all material facts with reference to the accident to be reported thereon, including the location, the circumstances, the conditions then existing, the persons and vehicles involved, the insurance information required under RCW 46.30.030, personal injury or death, if any, the amounts of property damage claimed, the total number of vehicles involved, whether the vehicles were legally parked, legally standing, or moving, and whether such vehicles were occupied at the time of the accident.

Id. at (4). The original of the report is either filed with or forwarded to the chief of the WSP. RCW 46.52.030(2).[3] As determined by the Supreme Court below, while these accident reports are not admissible in evidence, *see* RCW 46.52.080, they are discoverable under Washington's civil discovery rules. *Guillen* at 640.

Accident forms filed by law enforcement officers investigating accidents are required to be prepared "in the same manner as required of the parties to such accident and as fully as the facts in his possession concerning such accident will permit." RCW 46.52.070(1). As a result, these reports partake of the same information required to be provided by parties to an accident.

Under RCW 46.52.060 it is the responsibility of the chief of the WSP to take the accident reports submitted pursuant to state law and file, tabulate and analyze them for the purpose of generating data based thereon "showing

---

[3] RCW 46.52.030(1) requires that the accident report be directed to "the chief of police of the city or town if such accident occurred within an incorporated city or town or the county sheriff or state patrol if such accident occurred outside incorporated cities and towns." Under this statute accident reports for accidents in unincorporated areas of Pierce County would be directed to the WSP or county sheriff. Pierce County appears to argue that it is significant that there is no state requirement that *it* compile and collect motor vehicle accident history. Pet. Br. at 38 n.4. Under the proposed interpretation of §409 in this brief this fact is not determinative. If a Pierce County agency has obtained accident history or accident reports compiled or collected for non-§152 purposes, such information and materials remain outside of §409's protection, even in that agency's hands. *See infra*, §2.

the number of accidents, the location, the frequency and circumstances thereof, and other statistical information which may prove of assistance in determining the cause of vehicular accidents." RCW 46.52.060. The full text of this statute provides:

> It shall be the duty of the chief of the Washington state patrol to file, tabulate, and analyze all accident reports and to publish annually, immediately following the close of each fiscal year, and monthly during the course of the year, statistical information based thereon showing the number of accidents, the location, the frequency and circumstances thereof and other statistical information which may prove of assistance in determining the cause of vehicular accidents.
>
> Such accident reports and analysis of reports thereof shall be available to the director of licensing, the department of transportation, the utilities and transportation commission, the traffic safety commission, and other public entities authorized by the chief of the Washington state patrol, or their duly authorized representatives, for further tabulation and analysis for pertinent data relating to the regulation of highway traffic, highway construction, vehicle operators and all other purposes, and to publish information so derived as may be deemed of publication value.

Id.

In *Guillen*, the Washington Supreme Court held that, while under the second paragraph of this statute the full published reports may not be available to the public generally, litigants are entitled to obtain, under state law, the raw data consisting of " 'the number of accidents' at the location in question, the 'frequency,' and the 'circumstances

thereof,' " referenced in the first paragraph of RCW 46.52.060. *Guillen* at 639 n.8.

This state statutory scheme regarding accident reports long predates the federal statutes involved in this case, particularly §152, enacted in 1973. *See generally* Pub. L. No. 93-87, 87 Stat. 282 (Highway Safety Act of 1973). The substance of the referenced state statutes has remained essentially the same since at least 1937. *See* Washington Motor Vehicle Act, Wash. Laws 1937, ch. 189, §§133-40. This longstanding state statutory scheme provides for the compilation and collection of accident history information and accident reports solely for state purposes. The text of RCW 46.52.060 suggests that those state purposes include, but are not limited to, improving highway safety. (Other state purposes include civil and criminal law enforcement, and, more recently, ensuring the financial responsibility of drivers.) Significantly, there is no indication in Ch. 46.52 RCW that its requirements are traceable to state recordkeeping obligations imposed by federal law. However, there are regulations incorporating Ch. 46.52 RCW that implement a system of purely intrastate cooperation, designed to achieve uniformity in local traffic ordinances. *See* Ch. 308-330 WAC; *see also* RCW 46.90.005-.010 (enabling legislation for Ch. 308-330 WAC).[4]

---

[4] Washington State et al. amici assert, without citation, that while the WSP formerly maintained the accident database required under the 1966 Federal Highway Safety Act, this function has been transferred to the Washington State Department of Transportation. *See* Washington State et al. Amicus Br. at 21 & n.7. If the database referred to is the one maintained pursuant to RCW 46.52.060, this has been required by state law since 1937. Wash. Laws 1937, ch. 189, §138.

Nor do the state administrative regulations relied upon by Pierce County and Washington State et al. amici support the notion that the accident-related information and materials gathered pursuant to Ch. 46.52 RCW are collected for federal purposes. *See* WAC 136-28-010 – 030 (reproduced in Pet. Br. at App. 4a-5a); *see also* RCW 36.78.070 (enabling provision for these regulations). These regulations do not purport to convert the state purposes reflected in this statutory scheme to federal purposes. Instead, they generally require county engineers to avail themselves of state work product and enhance or embroider upon it in furtherance of the cooperation required of Washington as a participant in federal highway safety programs. *See e.g.* 23 U.S.C. §152(a) (requiring states to "conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, [etc.]"). Similarly, state statutes assenting to the purposes, provisions, terms and conditions of federal highway programs do not purport to otherwise convert the accident reporting system set forth in Ch. 46.52 RCW to federal purposes such as those set forth in 23 U.S.C. §152. *See* RCW 47.04.050-.080 (accepting federal highway safety program support and committing the state to act in a manner consistent with federal law).[5]

[5] Given the level of detail of information available as a result of accident-related recordkeeping required by Washington law, it is difficult to accept the argument of Washington State et al. amici that compliance with federal highway safety program requirements such as §152 has in any meaningful way expanded state tort liability. *See* Washington State et al. Amicus Br. at 15-18. The information and materials generated for state purposes under Ch. 46.52 RCW alone provide considerable background about the accident history of any particular collision site. Even if the accident report forms now used are

(Continued on following page)

Accident history and accident reports in Washington State are not compiled or collected solely for purposes of compliance with federal highway safety programs. As discussed below, the existence of independent state purposes for gathering such information and materials places them outside the limited scope of §409.

2) §409 Provides A Narrow Privilege Confined To Eliminating The "Silver Platter" Effect As To Information And Materials Compiled Or Collected Solely For Federal Purposes Pursuant To Federal Law.

In construing §409, the Court must favor the narrowest possible construction of the text. This is true not only under the doctrine of constitutional avoidance, *see Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), but also because §409 amounts to an evidentiary privilege. As a privilege, §409 stands "in derogation of the search for truth," and must be narrowly construed to encompass only the legitimate purposes it is designed to achieve. *See United States v. Nixon*, 418 U.S. 683, 710 (1974). Moreover, §409 will not be found to preempt areas within the traditional province of the states unless this is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, ___, 122 S.Ct. 999, 1006, 152 L.Ed.2d 27, 38 (2002) (invoking "clear statement principle of statutory construction"). Strict construction serves "the

designed to comport with federal highway safety program directives, this does not provide any new specie of tort liability in Washington.

interest of avoiding unintended encroachment on the authority of the States." *CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993).

The text and purpose of §409 readily support a narrower interpretation than that given by the Washington Supreme Court majority and urged by Pierce County. The statute provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. §409.

This language includes several significant limitations. Initially, the protection it affords applies only in an action for damages arising out of an occurrence at a location referenced in protected information and materials. *See* Washington State et al. Amicus Br. at 22. Further, in the context of this case, such information and materials are specifically limited to (1) "reports, surveys, schedules, lists, or data" that are (2) "compiled or collected," (3) "for the purpose of" safety enhancement, (4) "pursuant to [23

U.S.C. §152]."[6] Specific materials referenced in §409, *viz.* "reports," "surveys," "schedules," and "data," are the same as those identified in §§130, 144, and 152, suggesting the information and materials protected under §409 are only those relating to federal highway safety program requirements. *See Southern Pac. Transp. Co. v. Yarnell*, 890 P.2d 611, 614 (Az. 1995) (noting these are "words of art" limiting scope of §409 to information and materials generated pursuant to federal programs); *accord Dept. of Transp. v. Superior Court (Tate)*, 55 Cal. Rptr.2d 2, 5 n.6 (Cal. App. 1996).

The "purpose" and "pursuant to" requirements of §409 significantly restrict the reach of the statute. These terms make clear that information and materials, the compilation or collection of which cannot be traced to the specific purposes identified in §409, fall outside the scope of its protection. Several lower courts addressing these requirements have correctly observed that §409 does not protect information and materials compiled or collected *for other purposes*, such as for law enforcement purposes pursuant to state law. *See Yarnell* at 612-13; *Kitts v. Norfolk & Western Ry. Co.*, 152 F.R.D. 78, 81-82 (S.D.W.Va. 1993); *Irion v. State*, 760 So.2d 1220, 1226 (La. App.), *writ denied*, 773 So.2d 727 (La. 2000). As the court in *Kitts* explained:

---

[6] The first purpose set forth in §409 also references §130 (pertaining to railway-highway crossings) and §144 (pertaining to public highway bridges). A second purpose, *developing* any highway safety construction improvement project, is also mentioned, apparently to pick up compilations or collections relating to potential projects. Because these aspects of §409 are not at issue in this case, this brief refers only to the statutory purpose relating to §152.

> "There are, quite clearly, documents and records which have been created by the N&W long before safety enhancement and the provisions of section 409 were a 'gleam in the eye' of Congress, and such documents and reports would continue to be generated . . . . Had Congress contemplated that such reports and information were to be thrown into the safety enhancement pot and accorded protection, it could have spoken to the matter in section 409."

152 F.R.D. at 81-2.

§409's "purpose" and "pursuant to" requirements confirm that Congress did not contemplate that all information and materials concerning roadway hazards would be "thrown into the safety enhancement pot." *Id.* at 82. Rather, the language Congress chose in §409 recognizes the reality that information about roads and accidents has long been compiled and collected by states for other purposes, albeit not in the comprehensive, uniform fashion encouraged under the federal highway safety programs. *See e.g.* 23 U.S.C. §402(k) (conditioning federal funding on state implementation of uniform computerized recordkeeping system).[7] The independent information gathering and reporting activity that, at least in Washington, predates

[7] §402(k)(1) provides a limited privilege for any "report, list, schedule, or survey . . . prepared by or for a State or political subdivision thereof under this subsection," which subsection provides funding for development of a "comprehensive computerized safety recordkeeping system." This privilege does not purport to protect information and materials in the computer system itself, only the work product prepared based on the computerized data. Nor does §409 protect all information and materials in this computer system. As discussed in the main text, only those compiled or collected solely for §152 purposes are protected.

the 1966 Federal Highway Safety Act and serves other purposes, remains unaffected by §409. It involves information and materials that historically have been available and will likely continue to exist without regard to state participation in federal highway safety programs. *See supra*, §1; *cf. Irion* at 1226 (noting "[h]istorically, accident reports have been collected by the [Louisiana] Department of Public Safety for many other purposes.")

Given the limitations in the language of §409, this statute's application must be confined only to information and materials that would not be available but for state participation in federal highway safety programs. *See e.g. Palacios v. Louisiana & Delta R.R. Inc.*, 740 So.2d 95, 100-01 (La. 1999) (noting testimony that state transportation department would not have information requested "but for" activity under federal railroad safety assessment program); *see also* United States Br. at 32 n.24 (urging application of §409 to information or documents held by a transferee that "would not have existed but for . . . Section 152-related purposes"); Product Liability Advisory Council Amicus Br. at 9 (suggesting data sought by respondents would not exist "but for" federal highway safety program).

In other words, §409 applies only to information and materials that are compiled or collected *solely* for the specified federal purposes. It is not enough for a state to show that otherwise existing state information and materials "eventually become ingredients thrown into a soup kettle with a distinct flavor of safety enhancement." *Kitts* at 81. Instead, because they would exist without the overlay of the federal scheme, they remain discoverable or admissible, as determined by state law.

This narrow view of §409 properly puts the burden on the party asserting the privilege to prove its applicability. *See Tate* at 856. In particular, a state (or subdivision) must show which information or material requested by a plaintiff has been compiled or collected solely pursuant to §152. If it were sufficient that a federal purpose be *one of the reasons* for the compilation or collection of particular data, then, as some courts have suggested, §409 would have no limits. *See e.g. Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 & n.3 (8th Cir. 1992); *Lusby v. Union Pac. R.R.*, 4 F.3d 639, 641 (8th Cir. 1993); *Mackie v. Grand Trunk Western R. Co.*, 544 N.W.2d 709, 711 (Mich. App. 1996). Under this view, a state (or subdivision) may argue that, at least in part, it collects and compiles all roadway information in order to participate in federal highway safety programs. *See* Pet. Br. at 34 (citing WAC 136-28-010); Louisiana State Amicus Br. at 14-17 (arguing that standardized form for accident reports shows information is collected in part for federal purposes); Assoc. of Am. R.R. Amicus Br. at 29-30 (arguing accident reports and railroad files, etc., otherwise compiled or collected for state or operational purposes, fall within §409 as to entities that also gather them in part for purposes of federal programs). Looking to the particular *manner or method* used in compiling or collecting information and materials elevates form over substance. The *purpose* for compiling and collecting information and materials must govern whether they are a product of participation in federal highway safety programs, and thus subject to the §409 privilege.

To the extent particular information – such as coding or "spotting" on a report form – exists solely for purposes

of complying with uniform methods of information gathering under Title 23, this specific information may be privileged under §409, and subject to redaction from otherwise discoverable or admissible documents. *See* Louisiana State Amicus Br. at 14-15 (explaining "spotting"). This is so because the coded information would not exist but for §152 activity. Trial courts applying §409 must closely examine assertions of the privilege to assure that the only information and materials protected are those: (1) "compiled" for §152 purposes in the reports, surveys, schedules, etc. required under this section, or (2) "collected" for such purposes when not ultimately contained in such compilations.

This narrow application of §409 prevents a plaintiff from gaining the benefit of what Pierce County calls "one stop shopping." *See* Pet. Br. at 42. Similarly, under this view, a state will not be forced to turn over a neatly arranged "silver platter" of evidence. At the same time, this approach avoids the misuse of §409 to shelter data and records that are compiled or collected for non-§152 purposes, simply because this is done in the uniform manner encouraged under federal law.

A related issue concerns whether information and materials that are compiled or collected for dual purposes, both federal and non-federal, are subject to protection under §409 depending on which agency or source a tort plaintiff targets in discovery. Under the view of the Washington Supreme Court concurrence, also advanced by the United States here, information and materials gathered pursuant to state law may be available from the source that initially generated them for non-§152 purposes, but not from the agency that later compiled or collected them

for §152 purposes. *See Guillen* at 656-59 (Madsen, J., concurring); United States Br. at 30-36.

This "source-based" distinction featured prominently in the briefing before the Washington Supreme Court, which largely contemplated two discrete levels of information gathering and reporting – the first compiled or collected by law enforcement agencies pursuant to state law and the second by public works or transportation departments pursuant to §152.[8] However, the *Guillen* majority legitimately questions the workability or desirability of drawing a distinction based on the entity from whom discovery is sought, in light of advancing technologies and efficiencies in recordkeeping. *See* 31 P.3d at 646. Further, the United States posits the situation in which a single electronic database may be used concurrently for state and federal purposes. *See* United States Br. at §II.B.

The problems that may arise in any source-based application of §409 are answered by the "purpose-based" approach advanced here. §409 speaks to information and materials compiled or collected for specific purposes, without regard to their source or location. It should not matter whether a plaintiff seeks discovery from the local sheriff or from the state public works or transportation department. If the information and materials sought were

[8] WSTLA Foundation's amicus curiae brief in the Washington Supreme Court was most consistent with the interpretation of §409 reflected in the *Guillen* concurrence. The Foundation's view of the statute has since evolved largely in recognition of the *Guillen* majority's observation and the United States' argument here, both of which suggest that any source-based analysis of §409 results in undue expansion of the privilege beyond Congress' intent.

not compiled or collected solely for §152 purposes, no entity can assert a privilege over them. Further complications that may arise if all information and materials are contained in a single electronic database are addressed *infra*, §3.

This narrow view of the scope of §409 best comports with its limited purpose. Based on the clear language and context of the statute, it is universally understood as having been designed to encourage candor by states in gathering and reporting information required for participation in federal highway safety programs, by preventing such information from later being used to a state's disadvantage in tort ligitation. *See e.g. Coniker v. New York*, 695 N.Y.S.2d 492, 494-95 (N.Y. Ct. Cl. 1999) (and cases cited therein); *Palacios*, 740 So.2d at 98. Simply put, Congress sought in §409 "merely to keep the record-keeping required by Federal funding provisions from providing an additional, virtually no-work, tool for direct use in private litigation." *Light v. State of New York*, 560 N.Y.S. 2d 962, 965 (N.Y. Ct. Cl. 1990).

Under this view, §409 is in the nature of a "work product" privilege. To the extent Congress anticipated certain work product as part of information gathering and reporting under §152, and the implementation of federally funded safety enhancement projects, it protected the confidentiality of that work product by enacting §409. Otherwise, states would be faced with the unenviable choice of not participating in federal highway safety programs or handing over to litigants a "silver platter" of potentially damaging evidence.

§409's intent is thus to neutralize any litigation *disadvantage* to the states, not to create what Pierce

County seeks here – a strategic *advantage* that could amount to a practical immunity from tort liability. *See Yarnell* at 614-15 (noting §409 promotes "integrity of the federal regulatory scheme without compromising the integrity of the parallel state tort system"); *Tardy v. Norfolk S. Corp.*, 659 N.E.2d 817, 820 (Oh. App. 1995) (observing, "[i]f all accidents are reported and no evidence of prior reported accidents is admissible, a plaintiff could never meet the burden of proof under [Ohio tort law] – an anomalous result.")

Limiting §409 to information and materials that would not exist but for a state's participation in federal highway safety programs is also consistent with this Court's observation, in the related context of the Federal Railroad Safety Act, that federal funding requirements were not intended generally to supersede substantive state tort law. *See Easterwood* at 667-68 (noting regulations under 23 CFR pt. 924 are not preemptive as to state negligence law); *Norfolk So. R. Co. v. Shanklin*, 529 U.S. 344, 352-55 (2000) (finding preemption only as to regulations setting forth federal "standard of adequacy" for railroad warning devices, displacing state standards). Indeed, this Court observed in *Easterwood* that state negligence law and federal law may complement each other. *See Easterwood* at 668 (stating in response to argument that federal regulation is inconsistent with state common law, "the scheme of negligence liability could just as easily complement these regulations. . . . ")

In rejecting a narrow interpretation of §409, the Washington Supreme Court majority relied upon the 1995 amendment to the statute, which added the phrase "or collected" following the word "compiled." *See* Act of November 18, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N.

(109 Stat.) 568.[9] The majority viewed this amendment as signaling an intended "change" in the scope of §409, in response to judicial decisions, including *Wiedeman v. Dixie Elec. Mem. Corp.*, 627 So.2d 170 (La. 1993), *cert. denied*, 511 U.S. 1127 (1994), *Yarnell* and *Kitts*, *supra*. *See Guillen*, 31 P.3d at 642-44. Drawing a line of distinction between pre-1995 and post-1995 cases, it interpreted the 1995 amendment and accompanying legislative history as rejecting the view, set forth above, that §409 only covers information and materials gathered *solely* for the purpose of federal safety enhancement, pursuant to §152. *See id.* at 643-44 & n.21.

This view of the 1995 amendment is incorrect. With and without the words "or collected," courts have engaged in the same struggle over the proper scope of §409. *Compare Isbell v. State*, 9 P.3d 322 (Az. 2000) (adhering to *Yarnell* view after 1995 amendment, and holding documents compiled or collected under authority of state law not subject to §409 privilege), and *Robertson* at 1435 & n.3 (rejecting view that pre-1995 version of §409 protected only materials compiled "solely for federal funding projects.").

---

[9] In conjunction with this amendment, Congress stated:

> This clarification is included in response to recent State court interpretations of the term "data compiled" in the current section 409 of title 23. It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such data.

H.R. Rep. 104-246 §328, at 59 (1995).

The 1995 amendment answered only the particular view, represented by *Wiedeman*, that underlying factual data collected but not ultimately embodied in a §152-generated document, remains discoverable and admissible in evidence. *See* 627 So.2d at 173. The legislative intent note accompanying the amendment makes clear that such "raw data" collected *pursuant to §152* is equally protected under §409, regardless of whether it is ultimately embodied in any "formal or bound" federal submission. *See* H.R. Rep. 104-246 §328, at 59 (1995); *see also Reichert v. Dept. of Transp.*, 694 So.2d 193, 197-98 (La. 1997) (recognizing this effect of 1995 amendment).

While the 1995 amendment *clarified* the scope of §409, it did not expand its reach. It relates only to the categories of information and materials otherwise covered by §409 – "reports, surveys, schedules, lists, and data," collected for the purposes outlined in the statute. The requirement remains that the *purposes* for which information and materials are compiled or collected be federal. Raw data, no less than documents, reports or the like, which are compiled or collected for *other non-federal purposes*, remain outside §409's limited scope after the 1995 amendment.

Setting aside the 1995 amendment language, Pierce County and supporting amici also suggest that the word "compiled" must be broadly construed to include information and materials originally compiled for state purposes, when later compiled for federal purposes. *See* Pet. Br. at 12-13 n.3, 39-40; Louisiana State Amicus Br. at 20-22; AAR Amicus Br. at 28-29. This argument relies on comparison of §409 with Exemption 7 to the Freedom of Information Act (FOIA), 5 U.S.C. §552. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989). The two

statutes are not comparable. A broad reading of §409 implicates fundamental federalism concerns, an issue not involved in the interpretation of FOIA Exemption 7 in *John Doe Agency*. Moreover, it is not enough to say that the word "compiled" generally includes matter "originally compiled" for other purposes. *See id.* at 154-55. Consistent with §409's limited purpose of neutralizing an otherwise apparent disadvantage to states participating in federal highway safety programs, in this context the privilege applies only to documents and data compiled *solely* for the specified statutory purposes.[10]

This Court should adopt a narrow construction of §409. The purpose-based construction advanced here is fully supported by the text of the statute and consistent with the congressional goal of fostering uninhibited information gathering and reporting pursuant to §152, while creating neither an advantage nor disadvantage to states in civil litigation.

---

[10] Further, the legislative history accompanying the 1995 amendment suggests that use of "compiled" in §409 denotes only material contained in a "formal or bound report," because Congress found it necessary to add the words "or collected" to pick up raw data not so contained. *See supra*, n.9. This provides an additional reason for not relying on the textual analysis in *John Doe Agency* in interpreting the word "compiled" in §409. As explained in the main text, the words "or collected" do not otherwise broaden the scope of §409; the significant "purpose" requirement remains.

3) The Black Hole Specter: The Co-Mingling Of §152 Information And Materials With Those Gathered For Non-§152 Purposes In A Single Electronic Database Should Not Insulate Non-§152 Information And Materials From Discovery Under §409.

The narrow purpose-based analysis of §409 set forth above is distinct from the source-based analysis reflected in the *Guillen* concurrence, and the view of the United States before this Court. A purpose-based analysis avoids the specter of state agencies creating a "legal black hole" by dropping non-§152 information and materials into §152 work product files, thereby rendering all records subject to the privilege. *See Guillen*, 31 P.3d at 644. This purpose-based analysis also addresses the problem, recognized by the Washington Supreme Court and the United States, of applying §409 in the face of a single electronic database that is the only source of information and materials regarding accident history. *Id.* at 646-47; United States Br. at 36-39.

The *Guillen* majority's concern about a single electronic database may have been resolved in its opinion by limiting the §409 privilege to information and materials originally compiled for §152 purposes, and declaring the 1995 "or collected" amendment to §409 unconstitutional. *See* 31 P.3d at 655. On the other hand, the United States' source-based analysis ultimately leads it to conclude that the §409 privilege would apply to *all* information and materials contained in a single electronic database, whether or not generated solely for §152 purposes. United States Br. at 38-39. This is so because "the basic reasons for the very existence of such computer-based data storage

systems include facilitating applications for hazard improvement funds under Section 152." *Id.* at 37.[11]

It is unclear whether this case involves a single electronic database. *See* Pet. Br. at 1-3; Washington State et al. Amicus Br. at 19-21. In any event, the Court should reject the sweeping application of the §409 privilege under such circumstances. This approach makes the accessibility of information and materials originally generated for non-§152 purposes rise or fall according to the manner of recordkeeping. Nothing in §409 or its scant legislative history suggests the methodology for compiling or collecting information and materials should dictate the scope of the privilege.

Moreover, under the United States' proposed application of §409, the complete loss of access to non-§152 information and materials will leave tort victims in a worse position than had §409 not been adopted, a result it otherwise rejects as inconsistent with the statute. *See* United States Br. at 33-34; *see also Guillen*, 31 P.3d at 655 (describing motor vehicle accident history as "essential to the proper adjudication of claims brought under state and local law.") Non-§152 information and materials essential to proving viable tort claims – otherwise beyond the scope

---

[11] However unlikely, the equivalent of the single electronic database could also exist in the paper world, if a formal or bound §152 report becomes the exclusive source of information and materials, whether compiled or collected for §152 purposes or for other purposes. It is unclear whether the United States would similarly argue the entire work product would be deemed for §152 purposes in this instance, given no federal program (*e.g.* statute comparable to 23 U.S.C. §402(k)) encouraging states to consolidate all records in formal or bound reports.

of §409 – will be brought within the privilege. This will effectively provide an immunity not expressly granted by Congress, and not available under state law, in those states like Washington that permit tort claims of this nature against governmental entities. Under the United States' view, from a purely tactical standpoint, a state like Washington would be remiss if it did not convert its recordkeeping system to a single electronic database, so that it could take full advantage of the §409 privilege.

There is no indication that Congress intended the §409 privilege to create such a legal black hole. Instead, when information is contained in a single electronic database, the protection of §409 should only apply to §152-generated information and materials or the particular enhancement of or embroidery upon non-§152 information and materials undertaken solely for §152 purposes. *See supra*, §2.

The United States does not suggest that segregating information and materials based upon whether compiled or collected for §152 purposes is impossible in an electronic world. Moreover, that this requires a fact-specific application of §409 does not render the privilege unworkable or impractical. Trial courts are accustomed to resolving disputes among litigants as to the precise scope of an asserted privilege.

CONCLUSION

The Court should adopt the narrow reading of §409 proposed in this brief and resolve this case in a manner consistent with such reading.

Respectfully submitted,

DEBRA L. STEPHENS*
6210 E. Lincoln Lane
Spokane, WA 99217
(509) 465-5702

GREGG L. TINKER
101 Stewart St., Ste. 1010
Seattle, WA 98101
(206) 447-9640

**Counsel Of Record*

GARY N. BLOOM
P.O. Box 1461
Spokane, WA 99210
(509) 624-4727

BRYAN P. HARNETIAUX
517 E. 17th Ave.
Spokane, WA 99203
(509) 624-3890

Dated: August 9, 2002.

Supreme Court, U.S.
FILED
AUG 16 2002
OFFICE OF THE CLERK

(18)

No. 01-1229

IN THE

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,

Respondents.

On Writ Of Certiorari to Supreme Court of the State of Washington

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

MARY E. ALEXANDER
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President,
The Association of Trial Lawyers of America

JEFFREY ROBERT WHITE*
1050 31st. St., N.W.
Washington, DC 20007
(202) 965-3500
* *Counsel of Record*
Attorney for Amicus Curiae

38 pp.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE SUPREMACY CLAUSE DOES NOT AUTHORIZE CONGRESS TO PRESCRIBE THE SUBSTANTIVE OR PROCEDURAL RULES TO BE APPLIED BY STATE COURTS IN ACTIONS BASED SOLELY ON STATE LAW. 4

A. It is Not the Role of Congress to Regulate or Supervise State Tort Law. 6

B. The Supremacy Clause Does Not Support a Congressional Demand that State Courts Exclude Certain Evidence in State Law Damage Actions. 9

C. The Doctrine of Federal Preemption Does Not Apply to Congressional Regulation of State Courts, Rather than Private Conduct. 11

II. 23 U.S.C. § 409 IS NOT A VALID EXERCISE OF CONGRESSIONAL SPENDING POWER. 12

A. Sec. 409 Is Not A Condition On Receipt Of Federal Funds. 12

B. The Threat of Loss of All Highway Funds For Noncompliance With § 409 Is Impermissibly Coercive. 15

III. SECTION 409 IS NOT A VALID EXERCISE OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE. 16

A. Section 409 Does Not Regulate Interstate Commerce or the Use of Channels of Commerce, But Regulates State Courts. 16

B. Section 409 Does Not Regulate an Economic or Commercial Activity That Substantially Affects Interstate Commerce 17

IV. SECTION 409 IS NOT AUTHORIZED BY THE NECESSARY AND PROPER CLAUSE. 18

A. The Statute is not a "Necessary" Exercise of Power. 18

B. The Statute is Not a "Proper" Exercise of Power. 21

V. SEC. 409 VIOLATES STATE SOVEREIGNTY UNDER THE TENTH AMENDMENT. 22

A. This Court's Decision in *Garcia* Does Not Preclude This Court From Enforcing the Tenth Amendment Protections of State Authority Over State Law 23

B. The Tenth Amendment Protects the Sovereign Right of States to Declare and Apply State Law. 25

C. The Tenth Amendment Protects the Right of the People To Organize Their State Governments and Provide for the Separation of Powers As They See Fit. 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Alden v. Maine, 527 U.S. 706 (1999).....19, 20, 21, 22, 25,

Association for Women in Science v. Califano, 566 F.2d 339 (D.C. Cir. 1977).....7

Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970) 25

Barnes v. Gorman, 122 S. Ct. 2097 (2002).....12

Bernardt v. Polygraphic Co., 350 U.S. 198 (1956).....26

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). 11

City of Fargo v. Ruether, 490 N.W.2d 481 (N.D. 1992)..29

Coniker v. New York, 181 Misc. 2d 801, 695 N.Y.S.2d 492 (Ct. Cl. 1999).....8

Coyle v. Smith, 221 U.S. 559 (1911) 24

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993)....18

Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999)14

Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952) 10

Duncan v. Union Pacific. R. Co., 790 P.2d 595 (Utah Ct. App. 1990) 8

Edmonds v. State, 39 S.E.2d 24 (Ga. 1949).....27

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).....9, 26

Ex Parte Gounis, 263 S.W. 988 (Mo. 1924) 27

F.E.R.C. v. Mississippi, 456 U.S. 742 (1982) ...9, 10, 26, 28

Fay v. Noia, 372 U.S. 391 (1963) 26

Federal Maritime Comm'n v. South Carolina State Ports Auth., 122 S. Ct. 1864 (2002) 5

Felder v. Casey, 487 U.S. 131 (1988). 26

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).....23, 24

Gregory v. Ashcroft, 501 U.S. 452 (1991).....5

Griffin v. Breckenridge, 403 U.S. 88 (1971).....26

Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931).....26

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).....11

Howlett v. Rose, 496 U.S. 356 (1990). 10

Johnson v. Fankell, 520 U.S. 911 (1997). 11

Kitts v. Norfolk & W. Ry. Co., 152 F.R.D. 78 (S.D. W. Va. 1993) 7

Light v. State, 149 Misc. 2d 75, 560 N.Y.S.2d 962 (Ct. Cl. 1990).....8

Long v. State, Dep't of Transp. & Dev., 743 So. 2d 743 (La. Ct. App. 1999) 7

Lusby v. Union Pac. R.R. Co., 4 F.3d 639 (8th Cir. 1993) .7

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).....5, 19

Mackie v. Grant Trunk Western R. Co., 544 N.W. 709 (Mich. Ct. App. 1996).....8

Manns v. Commonwealth, 2002 WL 1307441 (Ky. 2002).....29

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 21

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).....26

McDougall v. Schanz, 597 N.W.2d 148 (Mich. 1999) 29

Missouri Pacific Ry. Co. v. Humes, 115 U.S. 512 (1885).21

Mondou v. New York, N.H. & H.R.Co., 223 U.S. 1 (1912).....10

New York v. United States, 505 U.S. 144 (1992)..... passim

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).....18

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981).....12, 14

People v. Easley, 152 Ill. App.3d 839, 505 N.E.2d 11, 105 Ill. Dec. 885 (Ct. App. 1987).....29

People v. Hollis, 670 P.2d 441 (Colo. App. 1983).....28

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 16

Printz v. United States, 521 U.S. 898 (1997) ...5, 10, 22, 24

Reno v. Condon, 528 U.S. 141 (2000).....23, 24, 25

Robertson v. Union Pacific R.R. Co., 954 F.2d 1433 (8th Cir. 1992). 7

Sackett v. Santilli, 47 P.3d 948, 146 Wash. 2d 498 (Wash. 2002) 29

South Carolina v. Baker, 485 U.S. 505 (1988) 23, 24

South Dakota v. Dole, 483 U.S. 203 (1987). 12, 15

State v. Ryan, 103 Wash. 2d 165, 691 P.2d 197 (1984) .29

State v. Wallace, 517 S.E.2d 20 (W. Va. 1999) 29

Steward Machine Co. v. Davis, 301 U.S. 548 (1937).....15

Sulpho-Saline Bath Co. v Allen, 66 Neb. 295, 92 N.W. 354 (1902).....27

Testa v. Katt, 330 U.S. 386 (1947) 9

Texas v. White, 74 U.S. (7 Wall.) 700 (1869).....5

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)..4

United States v. Lopez, 514 U.S. 549 (1995) 5, 16, 17, 21

United States v. Morrison, 529 U.S. 598 (2000) 16, 17, 18, 25

United States v. Wells, 519 U.S. 482 (1997).....19

West Virginia v. U.S. Dept. of Health and Human Services, 289 F.3d 281 (4th Cir. 2002) 15

STATUTES

U.S. Const. amend. X 30

U.S. Const. art. I, § 8, cl. 1. 14

U.S. Const. art. I, § 8, cl. 18 21

U.S. Const. art. I, § 8, cl. 3 19

U.S. Const., Art. IV, § 1 33

23 U.S.C. § 131.....16

23 U.S.C. § 141(b).....16

23 U.S.C. § 145(a) 26

23 U.S.C. § 154.....17

23 U.S.C. § 158.....16

23 U.S.C. § 159.....17

23 U.S.C. § 161.....17

23 U.S.C. § 409..... 6 & passim

Colo. Const. art. VI, § 21 35

Ky. Const., § 28. 35

Mich. Const. art. 6, § 5 35

N.D. Const. art. VI, § 3.....36

Ohio Const. art. IV, § 5(B) 34

W. Va. Const. art. 8, § 8.....36

OTHER AUTHORITIES

Annot., "Liability Of Governmental Entity Or Public Officer For Personal Injury Or Damages Arising Out Of Vehicular Accident Due To Negligent Or Defective Design Of A Highway," 45 ALR 3d 875 (1972) 24

H. Conf. Rep. No. 100-27, 104th Cong. 1st Sess. 9

Hart, Henry M., Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954). 12

Weinstein, Jack B. & Margaret M. Berger, WEINSTEIN'S EVIDENCE (1994) 7

Weinstein, Jack B. & Margaret M. Berger, WEINSTEIN'S EVIDENCE, (2d ed. 1998). 24

Wigmore, John Henry, WIGMORE ON EVIDENCE (McNaughton rev. 1940).....24

No. 01-1229

IN THE

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,

Respondents.

On Writ Of Certiorari to Supreme Court of the State of Washington

---

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae*. Letters granting consent of the parties to the filing of this brief have been filed with the Court.[1]

---

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions. Many who are wrongfully injured in automobile accidents seek legal redress in state court civil actions governed by state law. Fashioning liability rules to best serve the interests of justice, and procedural rules to govern such proceedings fairly and efficiently, historically has been the responsibility of the States.

In ATLA's view, 23 U.S.C. § 409 is a direct regulation of and unlawful interference in the States' judicial procedures. The statute far exceeds the constitutional bounds of Congress's authority and violates the principles of federalism that are the foundation of our form of government.

SUMMARY OF THE ARGUMENT

1. 23 U.S.C. § 409 directs state courts to preclude discovery and exclude from evidence in state-law damage actions a variety of documents, underlying data collected for those documents, and testimony based on them. The speculation that Congress intended to foster greater candor by those submitting highway safety information has no support in the legislative history. Rather, the statute's provisions suggest that Congress intended to make it more difficult for plaintiffs to pursue actions for death and injury due to negligent highway design and maintenance.

Congress, however, has no authority to declare or to supervise state tort law or the procedural rules governing such state-law actions.

The Supremacy Clause requires state courts to entertain federal causes of action and enforce the federal rights of individuals. It does not authorize

Congress to override state law with its own substantive or procedural rules of decision in cases based solely on state law. Similarly, the doctrine of federal preemption applies only where those subject to both federal and state sovereign authorities are faced with conflicting regulation. It does not permit Congress to regulate the way state governments regulate their citizens.

2. Section 409 is not a valid exercise of congressional power under the Spending Clause. Unlike other provisions in the highway safety statute, § 409 contains no express language to indicate to the States that compliance is a condition to receiving federal highway funds. Moreover, the threatened loss of all federal highway funding would make such conditional spending impermissibly coercive.

3. Nor is § 409 a valid exercise of power under the Commerce Clause. The statute does not regulate interstate commerce or the use of the channels of interstate commerce. It does not regulate economic or commercial activity having a substantial relation to interstate commerce. Instead, it purports to regulate state courts in the exercise of their judicial powers. To allow Congress such authority would create a completely centralized government.

4. Nor is § 409 supportable under the Necessary and Proper Clause. Sec. 409, added to the highway safety statute 17 years after its inception, cannot be deemed essential to this federally-assisted state program. States enjoy complete immunity except to the extent they consent to being sued. For Congress to offer States some protection against liability is to offer nothing. Congress could directly punish those who provide false or misleading information in state applications for highway funds. However, interference with the judicial

functions of state courts cannot be viewed as a proper means of obtaining accurate safety information.

5. Section 409 violates the Tenth Amendment. Congress has no authority to declare the substantive or procedural law applied by state courts in actions not based on a federal right or cause of action. Where the Founders deemed it appropriate for Congress to prescribe rules of evidence for state courts, they did so explicitly in the Full Faith and Credit Clause. In all other actions based on state law, this power is reserved to the States.

In addition, many state constitutions vest the authority to promulgate procedural rules in the judicial branch and render conflicting statutory rules invalid. Sec. 409 purports to empower state legislative or executive branches, by seeking federal funds, to evade separation of powers limits imposed by their own constitutions, violating basic precepts of federalism.

ARGUMENT

I. THE SUPREMACY CLAUSE DOES NOT AUTHORIZE CONGRESS TO PRESCRIBE THE SUBSTANTIVE OR PROCEDURAL RULES TO BE APPLIED BY STATE COURTS IN ACTIONS BASED SOLELY ON STATE LAW.

We the People have delegated to Congress broad, but not boundless, powers to govern us. The Founders did not entrust the liberties of Americans to a centralized government, however beneficent. The "genius of their idea" was to "split the atom of sovereignty" between national and state authorities, "each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). As the Court has recently

observed, "States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government," but retained their "inviolable sovereignty." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 122 S. Ct. 1864, 1870 (2002). Hence, ours is "an indestructible union, composed of indestructible states," *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869).

Dual sovereignty is a defining feature of our Nation's constitutional blueprint, and its preservation is essential, "to ensure protection of our fundamental liberties." *United States v. Lopez*, 514 U.S. 549, 552 (1995), quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted). Chief Justice John Marshall described this Court's responsibility in no uncertain terms:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

Accordingly, this Court has been vigilant in limiting congressional action to its proper constitutional scope. In *New York v. United States*, 505 U.S. 144, 161 (1992), the Court held that Congress may not "commandeer" state legislatures to serve its own regulatory ends. Similarly, the Court in *Printz v. United States*, 521 U.S. 898 (1997), precluded Congress from commandeering state executive branch agencies. This

case presents the opportunity for the Court to complete the trilogy by delimiting the extent to which Congress can commandeer the judicial branch of state governments to further its own policy views.

A. It is Not the Role of Congress to Regulate or Supervise State Tort Law.

At issue in this case is 23 U.S.C § 409, which provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Sec. 409 is not a statute of general applicability. It is a direct command to state courts ruling on discovery and admissibility of evidence in state-law damage actions. The statute covers a wide variety of materials beyond those required by the federal government to be submitted in a State's application for federal highway funds.[2] Sec. 409 is frequently invoked, as in this case, to

---

[2] This case does not involve the discovery or admissibility of documents within the control of federal agencies, which may be governed by various statutes mandating nondisclosure, *see* 2 Jack B. Weinstein & Margaret M. Berger, WEINSTEIN'S EVIDENCE ¶ 501[05] (1994). Such statutes may create a "required reports" privilege protecting information that must be submitted to a government agency. *See Association for Women in Science v. Califano*, 566 F.2d 339 (D.C. Cir. 1977).

bar the use of accident reports prepared by state or local law enforcement personnel, as well as traffic counts, surveys and diagrams of the accident location. It has been applied to citizen complaints of hazards to highway agencies and to letters from public officials calling attention to dangerous conditions. *See, e.g., Long v. State, Dep't of Transp. & Dev.*, 743 So. 2d 743, 747 (La. Ct. App. 1999).

The statutory bar is not directed at confidential communications, but encompasses publicly available documents as well as the underlying data collected to prepare such documents. It has been applied to exclude expert testimony based on covered materials, *e.g., Lusby v. Union Pacific R.R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993), and even newspaper articles based on information contained in covered materials. *Robertson v. Union Pacific R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992).

In 1987, when Congress added § 409 to the Highway Safety Act of 1973, it gave little indication of its purpose. *See Kitts v. Norfolk & W. Ry. Co.*, 152 F.R.D. 78, 82 n.14 (S.D.W. Va. 1993) ("The one respect in which all the cases interpreting section 409 are in agreement is that the section, seemingly, has no legislative history.") In the absence of a clear statement of legislative intent, Courts have suggested that Congress enacted section 409 for "at least two purposes: (1) to facilitate candor in the preparation of documents by protecting them from use in litigation . . . and (2) to prevent the record keeping required by federal law from providing 'an

additional, virtually no-work, tool for direct use in private litigation.'" *Mackie v. Grant Trunk Western R. Co.*, 544 N.W. 709, 711 (Mich. App. 1996) (citations omitted). *See also Coniker v. New York*, 181 Misc. 2d 801, 804, 695 N.Y.S.2d 492, 495 (Ct. Cl. 1999) (similar).

That Congress was concerned with a lack of candor in state applications for federal highway funds was the speculation of a single intermediate state court. *Duncan v. Union Pacific. R. Co.*, 790 P.2d 595, 597 (Utah Ct. App. 1990), aff'd on other grounds, 842 P.2d 832 (Utah 1992).[3] Neither Petitioner nor the United States has brought forward any additional direct evidence that a concern about candor was in fact Congress's motivation.

The second purpose imputed to Congress by some courts is to prevent covered materials from becoming a "virtually no-work, tool for direct use in private litigation." *Mackie, supra*; *Light v. State*, 149 Misc. 2d 75, 560 N.Y.S.2d 962, 965 (Ct. Cl. 1990). Congress's concern, in other words, was that some States make it too easy for plaintiffs to recover for wrongful injury or death due to negligent highway design.

Support for this view is found in the statute itself. Sec. 409 targets only damage actions. In addition, Congress provided no protection to those who actually submit information or prepare reports, surveys or lists. Instead, the benefits of the statute are bestowed on defendants – governmental and private parties – who may have had little or nothing to do with compiling or preparing those materials.

---

3 The Utah court's sole cited authority is the conference report, which merely paraphrases the provision. 790 P.2d at 597 n.2, citing H. Conf. Rep. No. 100-27, 104th Cong. 1st Sess. 172-173.

ATLA submits that it is beyond the authority of Congress to supervise state tort law or to require state courts to replace state law with what Congress views as a better rule in damage actions. As this Court stated:

> Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts.

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938).

B. The Supremacy Clause Does Not Support a Congressional Demand that State Courts Exclude Certain Evidence in State Law Damage Actions.

Despite this Court's clear demarcation of the limits on Congress's authority in *Erie*, Petitioners argue that Congress may demand that state courts apply "federal prescriptions," Brief for Petitioner at 19, relying on *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982), and this Court's decisions upholding federal preemption of state tort actions. *Id.* at 20 & 23.

This Court made clear in *Testa v. Katt*, 330 U.S. 386 (1947), that the Supremacy Clause requires state judges to entertain federal causes of action that are within their jurisdiction. As Justice O'Connor has pointed out, *Testa* and similar cases "all involve congressional regulation of individuals, not congressional requirements that States regulate." *New York v. United States*, 505 U.S. at 178. The duty of state courts to enforce the federal rights of individuals flows from the command of the Supremacy Clause that the "supreme Law of the Land" be enforceable in every State. *Id.*

It is one thing for Congress to bestow on individuals a federal right or cause of action which state courts must recognize. It is quite another for Congress to dictate directly to state courts how they must decide cases. A state court is not "to be treated as a Federal court deriving its authority not from the State creating it, but from the United States." *Howlett v. Rose*, 496 U.S. 356, 370 n.17 (1990). *F.E.R.C.* is not to the contrary. As the majority there stated, "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," 456 U.S. at 761-62; *Printz*, 521 U.S. at 929.

Hence, even in civil actions to enforce a federal right, Congress may not prescribe the procedural rules state courts must apply. *Howlett v. Rose, supra* at 369-72. *See also Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 56-57 (1912) (state courts must take cognizance of federal causes of action created by the Federal Employers Liability Act, where there was no "attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure."). *Cf., Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952) (Because trial by jury is "a basic and fundamental feature of our system of federal jurisprudence" and "part and parcel of the remedy afforded railroad workers" by the FELA, a state rule under which the trial judge determined the validity of a release could not be deemed a mere rule of procedure.).

Consequently, even where Congress has established a federal right of action, the general rule, "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954). *See also Johnson v. Fankell*, 520 U.S. 911, 919 (1997).

In this case, there is no federal right at stake. Congress lacks any authority to dictate to state courts either the substantive or procedural rules in actions governed by state law.

C. The Doctrine of Federal Preemption Does Not Apply to Congressional Regulation of State Courts, Rather than Private Conduct.

For similar reasons, § 409 cannot be supported on the basis of the doctrine of federal preemption.

Preemption is the Framers' solution to a problem created by replacing regulation of the states under the Articles of Confederation with direct regulation of persons, which is the basis of the Constitution. When an individual is subject to both federal and state regulations, the Supremacy Clause mandates that state law must yield, where that is the clearly expressed intent of Congress, where a state regulation actually conflicts with federal law, or where Congress intended federal regulation to occupy the field. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

Hence, the preemption doctrine applies only to the regulation of activities of private persons and businesses subject to dual sovereigns actors – not to the regulation of the States themselves or of state courts. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981). As this Court has explained:

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal

> interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

New York v. United States, 505 U.S. at 178.

II. 23 U.S.C. § 409 Is Not A Valid Exercise of Congressional Spending Power.

A. Sec. 409 Is Not A Condition On Receipt Of Federal Funds.

The Constitution empowers Congress to "provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Incident to this power, "Congress may attach conditions on the receipt of federal funds," including "compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

However, this Court has emphasized, if Congress wants to attach strings to its spending, it must announce its conditions clearly so that States can "exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* at 207. As the Court recently pointed out, conditional spending is in the nature of a contract; its validity depends upon placing the states on clear notice of its terms. *Barnes v. Gorman*, 122 S. Ct. 2097, 2100 (2002). "Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* at 2101, quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Sec. 409, however, gives no indication that compliance is a condition to receiving highway funds.

It is not sufficient that § 409 is part of a larger spending program that the States are free to accept or reject. *Pennhurst*, for example, involved the Developmentally Disabled Assistance and Bill of Rights Act of 1975. The Act's explicit purpose, similar to that of the federal highway statute, was to assist the States through the use of federal grants to improve the care and treatment of those with mental disabilities.

The Court held that a provision in the statute setting forth a "Bill of Rights" of the mentally disabled did not require the States to recognize substantive individual rights to care as a condition of receiving federal funds. That section of the statute, this Court pointed out, contained no conditional language. By contrast, in other sections of the Act where Congress intended to impose conditions, it did so explicitly. *Id.* at 23.

Similarly, Congress used no conditional language in the text of § 409. Indeed, as the Association of American Railroads observes, the plain text of the statute indicates that it is not conditional at all. Rather, "§ 409 limits the use of this information in *all* courts, whether or not the forum State accepts federal highway funds." Brief of the Association of American Railroads at 14-15 (emphasis in original). Contrary to Petitioner's assertion, a State's citizens who view § 409 as contrary to their interests cannot simply decline the federal grant. Brief for Petitioner at 24. If the residents of Washington were to reject federal highway money today, their decision would not remove the bar to use of evidence that has been collected. Nor would it allow use of future collections or compilations made for developing highway safety projects that might someday be eligible for federal funds.

As in *Pennhurst*, other sections of the same statute demonstrate that Congress knew how to attach conditions to the receipt of federal highway funds. For example, 23 U.S.C. § 158, the requirement that States establish a minimum drinking age of 21, which this Court upheld as a valid spending condition in *Dole*, spells out precisely what the states must do to fulfill the condition and describes the penalties for non-compliance. Other provisions are similarly detailed. *See* 23 U.S.C. § 131 (States that do not control outdoor advertising near interstate highways will lose 10% of federal highway funds); 23 U.S.C § 141 (States that do not adequately enforce state laws respecting maximum vehicle size and weights lose 10% of funds); 23 U.S.C. § 141(b) (States that permit heavy vehicles to be registered without proof of payment of federal taxes lose 25% of funds); 23 U.S.C. § 154 (States that do not enact open-container laws will be penalized by transfer of 1.5% to 3% of funds to alcohol-impaired driving programs); 23 U.S.C. § 159 (States that do not revoke or suspend licenses of those convicted of drug offenses will lose 5%, then 10% of funds); 23 U.S.C. § 161 (States that do not enact and enforce laws respecting driving by intoxicated minors lose 5%, then 10% of funds).

Sec. 409 contains no similar indication that funding is conditional on compliance, how compliance shall be determined, or the consequences of non-compliance. Even if Congress intended to make § 409 a condition for receipt of federal funds, the statute does not comply with this Court's repeated insistence that "Congress speak with a clear voice." *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 640 (1999), *quoting Pennhurst, supra* at 17.

B. The Threat of Loss of All Highway Funds For Noncompliance With § 409 Is Impermissibly Coercive.

Even if § 409 is deemed an exercise of the Spending Power, the Court in *Dole* made clear there is a limit to the pressure Congress may exert on States to obtain their acceptance of spending conditions. "[I]n some circumstances," the Court stated, "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole, supra* at 211, quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937). *Dole* involved 23 U.S.C. § 158, under which a State that established a minimum drinking age below 21 would lose 5% of its allotment of federal highway funds. The Court concluded that the threatened loss of this "relatively small percentage" of funds did not amount to coercion. *Id.*

Petitioner and the Solicitor General suggest that a State seeking to retain its own rules in its own courts must decline to participate in the highway-aid program altogether. Brief for Petitioner at 26; Brief for the United States at 43. Clearly, a State's loss of 100% of its share of highway funds would be a severe blow to the state budget and would place the lives and safety of those who use its highways at risk. By any standard, this degree of pressure amounts to compulsion. As the Fourth Circuit had occasion recently to observe, if the federal government were to withhold the entirety of a State's Medicaid funds for failure to satisfy a statutory condition, "then serious Tenth Amendment questions would be raised." *West Virginia v. U.S. Dept. of Health and Human Services*, 289 F.3d 281, 291 (4th Cir. 2002).

III. Section 409 Is Not A Valid Exercise Of Congressional Power Under The Commerce Clause.

A. Section 409 Does Not Regulate Interstate Commerce or the Use of Channels of Commerce, But Regulates State Courts.

Petitioner seek to bring § 409 within Congress's delegated power to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3, because it "favorably effect[s] the instrumentalities of interstate commerce." Brief for Petitioner at 32. The Solicitor General characterizes § 409 as "designed to protect and regulate transportation" by ameliorating hazards, thus protecting both the channels and the instrumentalities of interstate commerce. Brief for the United States at 42.

Undeniably, "Congress may regulate the *use* of the channels of interstate commerce" as well as "the instrumentalities of interstate commerce, or persons or things in interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558 (1995); *United States v. Morrison*, 529 U.S. 598, 609 (2000) (emphasis added). However, the plain text of 23 U.S.C. § 409 does not regulate interstate commerce, nor its instrumentalities nor the use of its channels. This Court has defined the word "regulate" more narrowly than simply than "to have an effect on." A statute that "regulates" must explicitly address the object of regulation. For example, the "common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987).

Section 409, on its face, regulates state courts in their conduct of civil actions under state law. Even if

state-law damage suits could be construed as a regulation of interstate commerce, the Commerce Clause "does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York v. United States*, 505 U.S. at 167.

B. Section 409 Does Not Regulate an Economic or Commercial Activity That Substantially Affects Interstate Commerce

Petitioner also relies on this Court's recognition that Congress may regulate activities having "a substantial relation to interstate commerce." Brief for Petitioner at 32.

That authority, however, extends only to the regulation of "*economic activity* [that] substantially affects interstate commerce." *United States v. Lopez*, 514 U.S. at 560. (emphasis added) Indeed, limiting the Commerce Power to regulating economic activity "was central" to the Court's decision in *Lopez*. *United States v. Morrison*, 529 U.S. at 610. The Court added that, in every case "where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce," the "regulated activity was of an apparent commercial character." *Id.* at 611 & n.4.

Court rulings on the discoverability of evidence and its admissibility in civil actions clearly are not an economic or commercial activity.

Much of the work of state courts – ranging from the abatement of nuisances to zoning appeals – can be seen to have an impact on interstate commerce. To allow Congress to prescribe the legal rules to be applied in such state-law actions would give Congress plenary authority over state courts as an attribute of the

Commerce Power. Such an unprecedented expansion of authority "would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Morrison*, 529 U.S. at 615; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

IV. SECTION 409 IS NOT AUTHORIZED BY THE NECESSARY AND PROPER CLAUSE.

A. The Statute is not a "Necessary" Exercise of Power.

Petitioner argues that § 409 should be upheld under U.S. Const. art. I, § 8, cl. 18, which allows Congress "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Brief for Petitioner at 35-36.

It is difficult to credit Petitioner's claim that § 409 is "essential" to the operation of the federal highway safety program. *Id* at 35. The program had been in operation for 14 years, growing at a healthy rate with participation of all States.

Nor is it self-evident that shielding defendants from liability results in obtaining more complete information. To the contrary, this Court has suggested:

> In fact, the scheme of negligence liability could just as easily complement these regulations by encouraging railroads -- the entities arguably most familiar with crossing conditions -- to provide current and complete information to the state agency responsible for determining priorities for improvement projects

CSX Transportation, Inc. v. Easterwood, 507 U.S. 658, 668 (1993).

Had Congress been concerned that state officials or other persons were being less than candid, it could have imposed penalties for submission of false or misleading information in connection with applications for highway aid as it has in other areas. *See United States v. Wells*, 519 U.S. 482, 505-06 & nn. 9 & 10 (1997) (Stevens, J., dissenting) (listing statutes).

The latitude accorded to Congress in selecting the means to carry out its program is limited by the Commerce Clause itself "by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to state governments." *New York v. United States*, 505 U.S. at 180.

As this Court has stated, quoting Chief Justice John Marshall:

> No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends.

Alden v. Maine, 527 U.S. 706, 753 (1999), quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819).

Petitioner insists that § 409 furthers federal interests by offering the States something they want – a shield against the use of evidence in state court damage actions – as incentive to give the federal government what it needs, accurate hazard information. Brief for Petitioner at 28; Brief for the United States at 42.

In fact, § 409 offers the States no incentive at all that they could not provide for themselves.

The States are clothed with immunity from suit as "a fundamental aspect of [their] sovereignty." *Alden v. Maine, supra* at 713, and so can insulate themselves completely from liability actions. Most States, have adopted tort claim statutes, reflecting "a sense of justice which has continually expanded by consent the suability of the sovereign." *Id.* at 755. *See generally,* Annot., "Liability Of Governmental Entity Or Public Officer For Personal Injury Or Damages Arising Out Of Vehicular Accident Due To Negligent Or Defective Design Of A Highway," 45 ALR 3d 875 (1972). Some have enacted "defective highway" statutes specifically to provide recourse for those injured by negligent roadway maintenance or design. *Id.* at § 9.

The power to consent to suit obviously includes the power to limit or permit the use of state-generated reports and other evidence in such actions. In addition, of course, every State establishes the rules governing discovery and admissibility of evidence in its own courts. Most states, for example, have enacted provisions making industrial or vehicle accident reports inadmissible in defined circumstances. John Henry Wigmore, WIGMORE ON EVIDENCE § 2377(3) (McNaughton rev. 1940); 2 Jack B. Weinstein & Margaret M. Berger, WEINSTEIN'S EVIDENCE, ¶ 502.04[2] (2d ed. 1998).

Absent federal intervention, then, States can choose to allow the use of such evidence, bar it completely, or limit its use in a manner calibrated to best serve the interests of the State and its people. Sec. 409 adds nothing to a State's ability to protect itself from liability in state courts. Instead, it "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right

of history and expertise." *Lopez* at 583 (Kennedy, J., concurring).

The statute takes away every State's ability to balance the competing interests of budgetary constraints, accountability of governmental and private entities, and "the duty of every State to provide, in the administration of justice, for the redress of private wrongs." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885), which this Court has deemed "[o]ne of the first duties of government" and "the very essence of civil liberty" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). As this Court recently emphasized:

> If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government . . .

Alden v. Maine, 527 U.S. 706, 751 (1999).

B. The Statute is Not a "Proper" Exercise of Power.

The federal government of course has an interest in the effectiveness of its spending programs. It is worth noting, however, that the highway safety program does not pursue a uniquely federal objective, overriding state interests. Congress explicitly established a "federally assisted state program" based on the preservation of State sovereign rights. The statute itself provides:

> **Protection of State sovereignty**.--The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be

> federally financed. The provisions of this chapter provide for a federally assisted State program.

23 U.S.C. § 145(a).

This Court held in *Alden v. Maine* that Congress cannot disregard state sovereignty to subject a State to liability suits in its own courts without its consent. Nor can Congress properly set aside state sovereignty, as Petitioner argues, to shield a State "from the threat of future tort actions" to which it has consented. Brief for Petitioner at 7.

"No matter how powerful the federal interest involved," this Court has declared, the Constitution simply does not give Congress the authority to treat the States as mere subdepartments of the federal government. *New York v. United States*, 505 U.S. at 188 Rather, "the Constitution protects us from our own best intentions: it divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Id.* at 187.

When an Act of Congress "violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a 'La[w] . . . proper for carrying into Execution the Commerce Clause.'" *Alden v. Maine, supra*, at 732-33, quoting *Printz, supra*, at 923-924.

V. SEC. 409 VIOLATES STATE SOVEREIGNTY UNDER THE TENTH AMENDMENT.

Even if § 409 were deemed to be within Congress's authority under the Commerce Clause, the Tenth Amendment stands as an independent check on congressional intrusion into the sovereignty of States:

> In *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.

Reno v. Condon, 528 U.S. 141, 149 (2000).

A. This Court's Decision in *Garcia* Does Not Preclude This Court From Enforcing the Tenth Amendment Protections of State Authority Over State Law.

Petitioner summarily dismisses any Tenth Amendment objection to the statute, relying heavily on *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *South Carolina v. Baker*, 485 U.S. 505 (1988). Pet. Br. at 17-19. Those decisions, involving generally applicable congressional regulations, do not extend to this case.

In those cased, this Court addressed "the extent to which state sovereignty shields the States from generally applicable federal regulations." *Baker, supra*, at 514. In directing the States to look to the "effectiveness of the federal political process" rather than "judicially created limitations on federal power," the *Garcia* Court did not reject constitutional protection of the sovereignty of the States. 469 U.S. at 552. Rather, the Court concluded that it was impossible to discern a principled line between "traditional state functions," exempt from valid Commerce Clause regulations, and other activities which should be subject to regulations applicable to any other employer, landowner or business enterprise. *Id.* at 538-39. The Court therefore found no Tenth Amendment violation where the Congress imposed "nothing more than the same minimum-wage and overtime obligations that

hundreds of thousands of other employers, public as well as private, have to meet." *Id.* at 554.

Similarly, in *South Carolina v. Baker, supra,* the Court upheld a requirement in the Tax Equity and Fiscal Responsibility Act of 1982, that publicly-offered long-term bonds be issued in registered form, whether issued by state or local governments or private corporations. 485 U.S. at 527. More recently, in *Reno v. Condon,* 528 U.S. 141 (2000), the Court held that a Tenth Amendment challenge would not lie against the Driver Privacy Protection Act precisely because it was a statute of general applicability and "does not require the States in their sovereign capacity to regulate their own citizens." *Id.* at 151.

It is a different matter where Congress has itself drawn the line that proved so elusive to the Court in *Garcia* by enacting legislation directed solely at the States' exercise of their sovereign powers. Indeed, the *Garcia* Court indicated that there are "affirmative limits" to federal actions affecting the States. *Id.* at 556. Significantly, the Court there cited *Coyle v. Smith,* 221 U.S. 559 (1911), holding that Congress may not dictate to a State the location of its capital, an "essentially and peculiarly state power[]." *Id.* at 565.

Sec. 409, like the legislation in *New York v. United States* and in *Printz,* is an explicit federal command to a branch of state government in the exercise of the States' sovereign power. In neither case was the Court obliged to entrust the protection of state sovereignty to the federal political process. Rather, the Court invalidated congressional commandeering as overstepping the bounds set by the Tenth Amendment. As the Court recently reaffirmed:

> [T]he Constitution has never been understood to confer upon Congress the ability to the require the States to govern according to Congress' instructions.

Reno v. Condon, 528 U.S. at 149. The constitutional protection of state courts from such congressional interference "is not solely a matter of legislative grace." *United States v. Morrison,* 529 U.S. 528, 616 (2000).

B. The Tenth Amendment Protects the Sovereign Right of States to Declare and Apply State Law.

The Founders framed the Constitution to provide for a strong national government, but they were equally concerned with limiting its power and preserving the sovereign states. "Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power." *Alden v. Maine,* 527 U.S. 706, 713-14 (1999).

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X

Most assuredly, "[o]ne of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs,* 398 U.S. 281, 285 (1970). State "courts have always been recognized as a coequal part of the State's sovereign decision-making apparatus," exercising "perhaps the quintessential

attribute of sovereignty." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 761 & 762 n.27 (1982).

No delegated power authorizes Congress to prescribe the rule of decision in controversies governed by state law. It is elemental that, "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330-31 (1816). It flows from this principle that:

> Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or "general," be they commercial law or a part of the law of torts.

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938). That power, Justice Brandeis added, is "reserved by the Constitution to the several States." *Id.* at 80. *Cf. Bernardt v. Polygraphic Co.*, 350 U.S. 198, 202 (1956) (under *Erie*, "Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases."); *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (suggesting that an attempt by Congress to establish "a general federal tort law" would founder on "constitutional shoals.").

Nor does the Constitution delegate to Congress any general authority to prescribe the procedural rules for state courts. The right of the States to establish the rules of procedure governing litigation in their own courts is "unassailable." *Felder v. Casey*, 487 U.S. 131, 138 (1988). *See also Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931) ("the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control"); *Fay v. Noia*, 372 U.S. 391, 466-67 (1963) (Harlan, J., dissenting) ("The right of the State to regulate its own

procedures governing the conduct of litigants in its courts, and its interest in supervision of those procedures, stand on the same constitutional plane as its right and interest in framing 'substantive' laws governing other aspects of the conduct of those within its borders.").

Where the drafters of the Constitution deemed it appropriate for Congress to prescribe rules concerning the admissibility of evidence in state courts, they delegated that power to Congress explicitly. The Full Faith and Credit Clause provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the *Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved*, and the Effect thereof.

U.S. Const., Art. IV, § 1 (emphasis added).

If Congress possessed a general authority to prescribe rules of evidence in state court proceedings, the second sentence of this provision would be superfluous. The drafters, however, determined that Congress could exercise such power only pursuant to an express grant of authority. *See Edmonds v. State*, 39 S.E.2d 24 (Ga. 1949) (apart from the Full Faith and Credit Clause, Congress has no power to prescribe rules of evidence in state courts).

That Congress cannot dictate the rules of evidence and procedure in state courts has long been "accepted as settled constitutional law." *Ex Parte Gounis*, 263 S.W. 988, 990 (Mo. 1924) (in banc); *see also Sulpho-Saline Bath Co. v Allen*, 66 Neb. 295, 92 N.W. 354, 356 (1902) ("Congress has no authority to make rules

governing the admission of evidence in the courts of this state").[4]

C. The Tenth Amendment Protects the Right of the People To Organize Their State Governments and Provide for the Separation of Powers As They See Fit.

In many state constitutions, the people have organized their governments and defined the powers of the constitutionally separate branches to provide that the judicial authority to promulgate rules of procedure is paramount over conflicting statutes. The Ohio Constitution, for example, declares that the "supreme court shall prescribe rules governing practice and procedure in all courts of the state," and that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Ohio Const. art. IV, § 5(B).

Other States have organized their governments and apportioned authority between the legislative and judicial branches in similar fashion. *See People v. Hollis*, 670 P.2d 441 (Colo. App. 1983) (under Colo. Const. art. VI, § 21, statutes governing procedural matters which conflict with rule promulgated by the Supreme Court are invalid as a legislative invasion of the court's rulemaking powers); *People v. Easley*, 152 Ill. App.3d

---

4 This Court has not squarely addressed the issue of Congress's power to command state courts to apply a congressionally formulated rule in state law cases. Justice Powell warned that to grant Congress "the power to pre-empt state-court rules of civil procedure and judicial review in classes of cases found to affect commerce" would "obliterate" the States by allowing Congress to "nibble away at state sovereignty bit by bit." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 774 (1982) (Powell, J., dissenting in part).

839, 842, 505 N.E.2d 11, 12, 105 Ill. Dec. 885, 886 (Ct. App. 1987) ("[I]f a statute conflicts with a rule of the supreme court adopted pursuant to constitutional authority, the Supreme Court Rule must prevail."); *Manns v. Commonwealth*, 2002 WL 1307441 at *4 (Ky. 2002) (statute providing for admissibility of juvenile records "is a legislative attempt to invade the rulemaking prerogative of the Supreme Court by legislatively prescribing rules of practice and procedure, [and] violates the separation of powers doctrine enunciated in Section 28 of the Kentucky Constitution."); *McDougall v. Schanz*, 597 N.W.2d 148, 154 (Mich. 1999) ("the authority to determine rules of practice and procedure rests exclusively with this Court" under Mich. Const. art. 6, § 5 and the doctrine of separation of powers); *City of Fargo v. Ruether*, 490 N.W.2d 481, 483 (N.D. 1992) (under N.D. Const. art. VI, § 3, "[t]he legislature cannot repeal the Rules of Evidence or the Rules of Civil Procedure made pursuant to the power provided us in the Constitution."); *State v. Wallace*, 517 S.E.2d 20, 25 (W. Va. 1999) (under W. Va. Const. art. 8, § 8 the "West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence . . . any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect.").

Similarly, in the State of Washington, "[i]t is a well-established principle that the Supreme Court has implied authority to dictate its own rules, 'even if they contradict rules established by the Legislature.'" *Sackett v. Santilli*, 47 P.3d 948, 951, 146 Wash. 2d 498, 506 (Wash. 2002) (citations omitted); *State v. Ryan*, 103 Wash. 2d 165, 178, 691 P.2d 197, 206 (1984) ("Where a

rule of court is inconsistent with a procedural statute, the court's rulemaking power is supreme.").

Section 409 effects a structural change in state government that is inconsistent with state sovereignty. By its terms, Congress authorizes a State's legislative or executive branch, by agreeing to accept highway funds, to evade the constitutional limits separating their powers from those of the co-equal judicial branch.

The statute makes Congress complicit in the abrogation of the constitutional covenant by which the people brought their State government into being, and violates the precepts of "Our Federalism," which this Court has enunciated with undeniable clarity.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

Jeffrey Robert White
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
ATLA Senior Amicus Counsel
Counsel of Record

August 16, 2002

(19)

Supreme Court, U.S.
FILED
AUG 19 2002
OFFICE OF THE CLERK

No. 01-1229

In The

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Washington

AMICUS BRIEF OF LAW PROFESSORS LYNN A. BAKER AND MITCHELL N. BERMAN IN SUPPORT OF RESPONDENTS

LYNN A. BAKER
Counsel of Record
MITCHELL N. BERMAN
727 E. Dean Keeton Street
Austin, Texas 78705
(512) 232-1325

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

38pp

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37 of this Court, *amici curiae* Law Professors Lynn A. Baker and Mitchell N. Berman move for leave to file the accompanying brief *amici curiae*.

Due to a lack of time, *amici curiae* did not seek formal consent to the filing of this brief from the parties, although counsel for Respondents, Salvador A. Mungia, has given verbal consent to the filing of this brief *amici curiae*.

Because of *amici curiae*'s extensive scholarly study of several areas of constitutional law at issue in this case, including the nature of the federal-state balance and the proper scope of Congress's power under the Spending Clause and Commerce Clause of Article I of our Constitution, *amici curiae* are able to provide the Court a useful perspective on these issues.

Amici curiae respectfully request that the Court grant this motion for leave to file the accompanying brief.

Respectfully submitted,

LYNN A. BAKER
Counsel of Record
MITCHELL N. BERMAN
727 E. Dean Keeton Street
Austin, Texas 78705
(512) 232-1325

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*	1
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. 23 U.S.C. § 409, as amended, exceeds Congress's Article I spending power	8
A. 23 U.S.C. § 409, as amended, is not unambiguous	8
B. 23 U.S.C. § 409, as amended, is "unrelated 'to the federal interest in particular national projects or programs'"	15
II. 23 U.S.C. § 409, as amended, exceeds Congress's power under the Commerce Clause	22
III. 23 U.S.C. § 409, as amended, is an unconstitutional intrusion upon state sovereignty	25
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 26

Buckley v. Valeo, 424 U.S. 1 (1976) 26

Coleman v. Thompson, 501 U.S. 722 (1991) 26

Coniker v. New York, 695 N.Y.S.2d 492 (N.Y. Ct. Claims 1999) 11

Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) 3, 15

Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359 (1952) 24

Dowell v. Louisiana, 750 So.2d 498 (La. App. 2000) ... 11, 17

Edward J. DeBartolo Corp. v. Flordia Gulf Coast Building & Constr. Trades Council, 485 U.S. 568 (1988) 14

Ex parte Alabama Dep't of Trans., 757 So.2d 371 (Ala. 1999) 12

Felder v. Casey, 487 U.S. 131 (1988) 24, 25

Fry v. Southern Pacific Trans. Co., 715 So.2d 632 (La. App. 1998) 11

FTC v. Ticor Tile Ins. Co., 504 U.S. 621 (1992) 27

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) 26

Guillen v. Pierce County, 31 P.3d 628 (Wash. 2001) ..*passim*

Guillen v. Pierce County, 982 P.2d 123 (Wash. App. 1999) 12

TABLE OF AUTHORITIES – Continued

Page

Hardenstein v. Cook Construction, 691 So.2d 177 (La. App.1997) 12

Irion v. Louisiana, 760 So.2d 1220 (La. App. 2000) 12

Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958) 17

Isbell v. Arizona, 9 P.3d 322 (Ariz. 2000) (en banc) 11

Jones v. United States, 529 U.S. 848 (2000) 14

Massachusetts v. United States, 435 U.S. 444 (1978) (plurality opinion) 16

Myers v. United States, 272 U.S. 52 (1926) 26

National Railroad Passenger Corp. v. Transwood, Inc., 2001 WL 986868 (E.D. La. 2001) 11

New York v. United States, 505 U.S. 144 (1992) 17, 26, 27

Palacios v. Louisiana & Delta R.R., Inc., 740 So.2d 95 (La. 1999) 11

Palacios v. Louisiana & Delta R.R., Inc., 682 So.2d 806 (La. App. 1997) 12

Patterson v. New York, 432 U.S. 197 (1977) 25

Pennhurst State School and Hospital v. Haiderman, 451 U.S. (1981) 9

Powers v. CSX Transportation, Inc., 177 F. Supp.2d 1276 (S.D. Ala. 2001) 9, 11

Printz v. United States, 521 U.S. 898 (1997) 27

Reichert v. Louisiana, 694 So.2d 193 (La. 1997) 12

Rodenbeck v. Norfolk & W. Ry., 982 F. Supp. 620, 624 (N.D. Ind. 1997) 19

Severio v. Louisiana, 752 So.2d 221 (La. App. 1999) 11

TABLE OF AUTHORITIES – Continued

Page

Snyder v. Massachusetts, 291 U.S. 97 (1934) 25

South Dakota v. Dole, 483 U.S. 203 (1987) ..... *passim*

Speiser v. Randall, 357 U.S. 513 (1958) 25

United States v. Lopez, 514 U.S. 549 (1995) ..... *passim*

United States v. Morrison, 529 U.S. 598 (2000) 4, 23, 24, 26

United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366 (1909) 15

Werner v. IA Construction Corp., 51 Pa. D. & C. 4th 509 (2001) 12

STATUTES

23 U.S.C. § 152 ..... 5, 6, 8, 17, 18, 19

23 U.S.C. § 402 ..... 17, 19

23 U.S.C. § 409 ..... *passim*

Act of Nov. 28, 1995, Pub. L. No. 104-59, 1995 U.S.C.A.A.N. (109 Stat.) 591 6

Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (1966) 17, 29

Wash. Sess. Laws 1961, ch. 136 27

LEGISLATIVE HISTORY

H.R. Rep. 104-246 (1995), (*reprinted in* 1995 U.S.C.A.A.N. 1679) 6

RULES

Supreme Court Rule 37.6 2

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911 (1995) 1, 29

Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104 (2001) 1

Lynn A. Baker, *Federalism: The Argument from Article V*, 13 GA. ST. UNIV. L. REV. 923 (1997) 1

Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001) 1

Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CINN. L. REV. 433 (2002) 2

Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL'Y 95 (1998) 1

Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAPMAN L. REV. 195 (2001) 1, 29

Lynn A. Baker & Mitchell N. Berman, *Getting off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. ___ (forthcoming Feb. 2003) 2

Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001) 1, 26

Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001) 1

TABLE OF AUTHORITIES – Continued

Page

Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, *State Accountability for Intellectual Property Rights: How to "Fix"* Florida Prepaid *(And How Not To)*, 79 TEX. L. REV. 1037 (2001)..... 1

Richard A. Epstein, *Bargaining with the State* (1993).....29

William Van Alstyne, *"Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law*, 16 HARV. J.L. & PUB. POL'Y 303, 319 (1993).....30

INTEREST OF *AMICI CURIAE*

This amicus brief is filed on behalf of Respondents and submitted by law professors Lynn A. Baker and Mitchell N. Berman ("Law Professors").

We are both tenured professors at the University of Texas School of Law in Austin, Texas, who teach and write on constitutional law.

More particularly, we have each devoted a substantial portion of our scholarly work to study of the spending power, particularly conditional federal spending, and federalism. Our publications in this area include:

- Lynn A. Baker, *Conditional Federal Spending after* Lopez, 95 COLUM. L. REV. 1911 (1995)
- Lynn A. Baker, *Federalism: The Argument from Article V*, 13 GA. ST. UNIV. L. REV. 923 (1997)
- Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL'Y 95 (1998)
- Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAPMAN L. REV. 195 (2001)
- Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104 (2001)
- Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001)
- Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001)
- Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001)
- Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, *State Accountability for*

Intellectual Property Rights: How to "Fix" Florida Prepaid *(And How Not To)*, 79 TEX. L. REV. 1037 (2001)

- Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CINN. L. REV. 433 (2002)
- Lynn A. Baker & Mitchell N. Berman, *Getting off the* Dole: *Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. ___ (forthcoming Feb. 2003)

As law professors, our interest in this case is straightforward: to encourage the law of this nation to evolve in a desirable way, and to contribute our expertise to this Court's important role in that process.

We received no compensation for, and anticipate no financial gain from, writing this brief.[1] Further, we speak only for ourselves. The views expressed herein do not constitute the opinions of the State of Texas, the University of Texas, or the University of Texas School of Law.

SUMMARY OF ARGUMENT

In *Guillen v. Pierce County*, 31 P.3d 628 (Wash. 2001), the Washington Supreme Court held that a condition on Congress's offer to the states of certain federal funds exceeded Congress' Article I powers, including its powers under the Spending Clause and the Commerce Clause. We agree with the Court's holding, but offer a somewhat different analysis.

[1] In compliance with Rule 37.6, Law Professors state that this brief was not written in whole or in part by counsel for a party, and no person or entity other than Law Professors made a monetary contribution to the preparation or submission of this brief.

The condition at issue, 23 U.S.C. § 409, violates at least two of the requirements set out by this Court in *South Dakota v. Dole*, 483 U.S. 203 (1987), for constitutionally permissible conditions on federal funds: the "clear notice" requirement and the "relatedness" requirement. We identify four significant ambiguities in the text of § 409, and note the extensive disagreement among the national judiciary as to the intended meaning and scope of the provision. We conclude that § 409 cannot plausibly be described as "unambiguous[]," as required by *Dole*, 483 U.S. at 207.

Moreover, although in many contexts the Court has the obligation to construe an ambiguous statute to avoid a potentially unconstitutional construction, the mere existence of such an ambiguity in a conditional offer of federal funds is fatal under *Dole*, *id.*; *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999).

Section 409 also fails *Dole*'s "relatedness" requirement. The federal interest to be served by the federal funds on which § 409 is a condition on receipt is increasing highway safety. Because the § 409 privilege extends to documents and data that would have existed and would not have been privileged in the absence of the federal funding scheme, it diminishes the ability of individuals to successfully sue the state and localities for hazardous road conditions, relative to the state of affairs that would exist if the § 409 privilege did not extend so far. At the same time, extending the privilege this far provides no countervailing increase in highway safety. The net result – a certain decrease in highway safety – is obviously antithetical to the federal interest in increased highway safety at the center of the federal funding scheme of which § 409 is a part.

We contend that § 409, under which Congress seeks to regulate the rules of evidence to be applied in state court

civil proceedings involving causes of action brought solely under state law, also exceeds Congress's power under the Commerce Clause. In order to uphold § 409 under *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), it would be necessary for this Court to find that all civil litigation in state court involving causes of action brought solely under state law is "economic activity" that "substantially affects interstate commerce," *Lopez*, 514 U.S. at 560; *Morrison*, 529 U.S. at 611. Such a finding is implausible, and would in any case require this Court to authorize pervasive congressional regulation of an area in which the states historically have been sovereign.

Finally, we argue that § 409 is an unconstitutional intrusion upon state sovereignty, insofar as it obscures political responsibility at the expense of individuals' rights under state law.

ARGUMENT

The relevant facts, for purposes of the questions addressed herein, are these. Motorists involved in traffic accidents sought access to accident reports and other materials and data held by local governments related to the traffic history of the sites of their accidents in connection with tort actions alleging negligence by the governments in their maintenance of the intersections at which the accidents occurred. The governments refused to disclose the requested information in reliance in part on a federal statute, 23 U.S.C. § 409, as amended in 1995, which states:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Because the accident reports and other materials that the plaintiffs sought had been collected by the relevant local governments as part of an application to the state of Washington for federal hazard elimination funds under 23 U.S.C. § 152, *Guillen*, 31 P.3d at 632-33, the local governments argued that they were privileged under § 409, as amended. The question for the Washington Supreme Court was whether the collecting of certain reports and other materials for this statutorily specified purpose rendered them privileged even if those reports and other materials had been compiled for other purposes, such as routine law enforcement, *id.* at 644-46.

To understand the import of the question, consider the following example. A local police officer prepares (compiles) an accident report as he is required to do under longstanding state law. At a later point in time, that report is collected by a state authority pursuant to 23 U.S.C. § 152 in order for the state to determine the ten intersections in the state where safety improvements are most needed. The state authority prepares a report discussing those ten intersections which it uses to set its priorities for spending its annual allotment of federal highway safety funds. Plainly, the report prepared by the state pursuant to § 152 would be covered by the § 409 privilege. The question before the state court, however, was whether the original accident reports – reports that (by hypothesis) would have

been prepared even in the absence of the federal scheme, and which were not *compiled* pursuant to § 152 – would *also* be covered by the privilege once they were *collected* pursuant to § 152 in order to generate the report of highway safety priorities.

The Washington Supreme Court held that they were. *Id.* at 646. Under the statute's plain language, it reasoned, materials or data that have been "collected" for a statutorily specified purpose are covered by § 409, as amended. *Id.* Whether the materials or data had been originally compiled for distinct purposes appears irrelevant. *Id.* Moreover, the history of the evolution of § 409 bolstered this interpretation. When initially enacted in 1987, that section did not contain the words "or collected." Accordingly, the Court observed, "most state courts restricted the application of the federal privilege" to materials and data "that had been specifically created for the purpose of applying for federal safety improvement funding of implementing a funded project." *Id.* at 641. Congress amended § 409 in 1995 by adding the words "or collected" after "compiled" specifically in response to these narrow decisions and in order to "clarify" the intended scope of the privilege. H.R. Rep. 104-246 § 328, at 59 (1995); *see* Act of Nov. 28, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N. (109 Stat.) 591. And Congress described the privilege's scope as follows:

> It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mention[ed] or addressed in such data.

Id. For these reasons, the Washington Supreme Court agreed with Pierce County that any reports or data

collected for the statutorily specified purposes became fully privileged. *Guillen*, 31 P.3d at 644.

But Pierce County's victory on the question of the scope of the privilege afforded by § 409, as amended, quickly turned Pyrrhic. For the Washington Supreme Court proceeded to hold that when construed so broadly the § 409 privilege violated *Dole's* relatedness requirement:

> We find that no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and "raw data" that were originally prepared for routine state and local purposes, simply because they are "collected," for, [sic] among other reasons, pursuant to a federal statute for federal purposes.

Guillen, 31 P.3d at 651 (emphasis in original omitted). The Court therefore held § 409, as amended, to exceed Congress's spending power. In addition, the Court concluded that Congress's enactment of § 409, as amended, was not authorized by the Commerce Clause or the Necessary and Proper Clause, and was an unconstitutional violation of state sovereignty.

Three justices of the Washington Supreme Court disagreed with the majority's interpretation of § 409, as amended. As Justices Madsen and Johnson and Chief Justice Alexander read the privilege, an individual report originally compiled for an ordinary state or local law enforcement purpose was not covered by § 409 merely because it was later collected, along with other reports or data, for the purpose of applying for a share of the state's federal safety-improvement funds. *Guillen*, 31 P.3d at 657 (Madsen, J., concurring). All that the 1995 amendment clarified, in the view of the concurring justices, was that if

these reports were subsequently "collected" pursuant to § 152 or another specified provision of federal law, the *collection* of reports would not itself be discoverable. *Id.* at 658.

In other words, as the concurring justices read the legislative history, in amending § 409 in 1995 Congress was reacting against judicial decisions that permitted plaintiffs "to gain information that was 'collected' by an agency for the purpose of preparing an application for federal funding from the agency that 'collected' the information." *Id.* at 657. By adding "or collected" to "compiled," under this view, Congress simply wanted to ensure that a plaintiff could not exploit the state's action of collecting reports to save it from doing its own work in litigation against the state or any of its political subdivisions. *Id.* It would not follow, the Concurrence concluded, that plaintiffs should be handicapped when "seeking information or reports from their original source, such as accident reports from a law enforcement agency." *Id.*

I. 23 U.S.C. § 409, as amended, exceeds Congress's Article I spending power

In *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), this Court held that the spending power is "subject to several general restrictions." Section 409 of Title 23 violates at least two of the requirements set out in *Dole* for constitutionally permissible conditions on federal funds: the "clear notice" requirement and the "relatedness" requirement.

A. 23 U.S.C. § 409, as amended, is not unambiguous

In *Dole*, this Court held that "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their

participation.'" 483 U.S. at 207, quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). The reason for this requirement is straightforward: "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 17. "The legitimacy of Congress's power to legislate under the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the 'contract'." *Id.*

> There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must . . . . speak with a clear voice . . . .

Id.

The text of 23 U.S.C. § 409, as amended, contains at least four significant ambiguities of the sort that have precluded States and their political subdivisions from knowing with any certainty the terms of their "contract" with the federal government. In the recent words of one federal district court, "Section 409 has engendered some confusion in the courts, thanks to its unwieldy language and the absence of any significant legislative history," *Powers v. CSX Transportation, Inc.*, 177 F. Supp.2d 1276, 1277 (S.D. Ala. 2001). Recall that, as amended, 23 U.S.C. § 409 states:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data *compiled or collected* for *the purpose* of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be

> implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence *in a Federal or State court proceeding or considered for other purposes in any action for damages* arising from any occurrence at a location *mentioned or addressed* in such reports, surveys, schedules, lists, or data.

(emphases added).

The first ambiguity is the one that divided the Washington Supreme Court, as described above: if a report, survey, or any other specified item is originally compiled for purposes entirely unrelated to a federally funded highway-safety improvement project, does the report itself and the data contained therein become privileged simply because it has been subsequently collected for purposes of such a federally funded project? That is, can a local government shield from discovery and introduction into evidence all pre-existing, highway-related reports and data simply by collecting them for the purposes specified in § 409, as amended?

The language of § 409, as amended, seems strongly to support an affirmative answer. But the concurring justices' reading is also arguably consistent with the text of § 409, as amended. As even the majority of the Washington Supreme Court acknowledged,

> state courts have *understandably* remained reluctant to *construe* § 409 in a manner that creates a legal black hole into which state and local governments can drop virtually all accident materials and facts, simply by showing that such materials and 'raw data' are also 'collected' and used to identify and rank candidates for federal safety improvement projects statewide.

Guillen, 31 P.3d at 644 (emphases added).

Furthermore, as the *Guillen* concurrence explained, its narrower reading of the § 409 privilege would not

render the 1995 amendment pointless. Some state courts had held prior to 1995 that data collected by one state agency for a purpose specified in § 409 were discoverable *even from that collecting agency* so long as they had originally been compiled by other agencies for purposes not mentioned in § 409. On the reading favored by the *Guillen* concurrence, the 1995 amendment made clear that this was wrong. Thus, the amendment serves a function even if it does not establish, as the *Guillen* majority held, that the subsequent collecting of the data made the data undiscoverable even in their original form from the agencies that had initially compiled them. This is not a merely formalistic distinction, for plaintiffs' attorneys would find their jobs much easier if they could piggyback on a single government agency's efforts to identify and assemble relevant data or reports compiled by several other governmental entities. In the end, if the *Guillen* concurrence's favored reading of the § 409 condition on federal funds is a textually permissible one, the condition is ambiguous and must fall under *Dole*.

The practical significance of this textual ambiguity is evidenced by the fact that the sixteen courts, including the Washington Supreme Court, that have discussed this aspect of the provision in applying § 409, as amended, have been divided in their interpretations. Ten courts have interpreted this aspect of § 409, as amended, broadly as the *Guillen* majority did. *See Powers v. CSX Transportation*, 177 F. Supp.2d 1276, 1280 (S.D. Ala. 2001); *National Railroad Passenger Corp. v. Transwood, Inc.*, 2001 WL 986868 *1, *2 (E.D. La. 2001); *Isbell v. Arizona*, 9 P.3d 322, 324 (Ariz. 2000) (en banc); *Dowell v. Louisiana*, 750 So.2d 498, 501 (La. App. 2000); *Sevario v. Louisiana*, 752 So.2d 221, 230 (La. App. 1999); *Palacios v. Louisiana & Delta R.R., Inc.*, 740 So.2d 95, 101-02 (La. 1999); *Coniker v. New York*, 695 N.Y.S.2d 492, 495, 496 (N.Y. Ct. Claims 1999); *Fry v. Southern Pacific Trans. Co.*, 715 So.2d 632, 637 (La.

App. 1998); *Hardenstein v. Cook Construction*, 691 So.2d 177, 182 (La. App. 1997); *Reichert v. Louisiana*, 694 So.2d 193, 200 (La. 1997). Meanwhile, five courts have read the text more narrowly, essentially as the *Guillen* concurrence did. *See Werner v. IA Construction Corp.*, 51 Pa. D. & C. 4th 509, 513 (2001); *Irion v. Louisiana*, 760 So.2d 1220, 1226 (La. App. 2000); *Guillen v. Pierce County*, 982 P.2d 123, 129 (Wash. App. 1999); *Ex parte Alabama Dep't of Trans.*, 757 So.2d 371, 374 (Ala. 1999); *Palacios v. Louisiana & Delta R.R., Inc.*, 682 So.2d 806, 810 (La. App. 1997).

A second respect in which § 409, as amended, is ambiguous is closely related to, yet analytically distinct from, the first. Suppose now that a report is *simultaneously* created for various purposes, only one of which involves planning for federally funded highway-safety improvements. Say, for example, that a municipality conducts a survey of road usage patterns at a particular intersection for two reasons: to design a routing plan for its public transportation system, and to assess the safety of the intersection for purposes of a federally funded highway-safety improvement project. Is the survey privileged under § 409, as amended?

It is difficult to know. Is a survey "compiled or collected for the purpose of" planning or developing federally funded highway-safety improvements when that is merely *a* purpose, but not *the sole* purpose for which the survey is created? Does it matter whether the statutorily specified purpose is not even a *but-for* purpose for the survey's creation? The text of § 409, as amended, does not resolve this mixed-motive problem, and on its face can support either the privileging or the admissibility of the survey.

The third major textual ambiguity in § 409, as amended, concerns the proceedings to which the privilege applies. Suppose a defendant on trial for vehicular homicide seeks to introduce data related to the accident history

at the location of the accident to support his contention that he was guilty, at most, of ordinary civil negligence. Are the data admissible if they have been collected for the statutorily specified purpose? In other words, does the privilege apply only to Federal or State court proceedings for damages, or does it apply even to Federal or State court criminal proceedings and civil actions seeking injunctive relief?

Again, the text of § 409, as amended, provides little guidance. In relevant part, § 409 states that the covered documents and data

> shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Clearly, the data would not be privileged in our hypothetical case had Congress included commas in § 409 as follows: " . . . a Federal or State court proceeding, or considered for other purposes in any action, for damages arising from. . . . " The opposite interpretation would seem clear if Congress had instead inserted commas as follows: " . . . a Federal or State court proceeding, or considered for other purposes in any action for damages, arising from. . . . "

Unfortunately, Congress neglected to include any commas at all in this portion of the text of § 409, both as amended in 1995 and as originally enacted in 1987. So neither of these two interpretations is clearly inconsistent with, or mandated by, the text of the provision.

The fourth noteworthy textual ambiguity in § 409, as amended, is in the final clause of the provision: " . . . any action for damages arising from any occurrence at a location mentioned or addressed in such data." Consider a

hypothetical report prepared pursuant to the federal scheme that lists and describes only the ten locations determined by the state to be most in need of safety improvements. Imagine further that this list was arrived at after an analysis of the locations of all traffic accidents that occurred during the preceding twelve months.

What is the status of a location at which at least one accident occurred during the preceding twelve months and that was therefore a part of the data analysis that was necessary for the creation of the state's "worst ten" list? Is such a location "mentioned or addressed in such data"? What is the status of a location at which no accident occurred during the preceding twelve months and which therefore arguably was not even included in the data analysis that resulted in the "worst ten" list? Is such a location "mentioned or addressed in such data"? Again, the text of § 409, as amended, permits either reading.

Given the above four facially apparent and significant ambiguities in the text of § 409, as amended, as well as the extensive disagreement among the nation's judiciary as to the intended meaning and scope of the provision, this condition on federal funds cannot plausibly be described as "unambiguous[]," as required by *Dole*, 483 U.S. at 207. Because Congress has not spoken "with a clear voice" in § 409, as amended, the States are not able "to exercise their choice knowingly, cognizant of the consequences of their participation," *Dole*, 483 U.S. at 207. Thus, under *Dole*, § 409, as amended, must be found to exceed Congress's Article I spending power.

In many contexts, this Court has the option – indeed the self-imposed obligation – to construe an ambiguous statute to avoid a "constitutionally doubtful" construction where possible. *See, e.g., Jones v. United States*, 529 U.S. 848, 851, 857 (2000); *Edward J. DeBartolo Corp. v. Flordia Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

Under this Court's spending power doctrine as set forth in *Dole*, however, the mere existence of the ambiguity is constitutionally determinative – and fatal. This is not only because such legislation is "in the nature of a contract," *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999); *see also id.* at 655 (Kennedy, J., dissenting), but also because "the clear-notice safeguard of our Spending Clause jurisprudence" is a "vital safeguard for the federal balance," *id.* As Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, recently wrote in their dissent in *Davis*, "Only if states receive clear notice of the conditions attached to federal funds can they guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power," *id.*

Given its various textual ambiguities as well as the extensive disagreement as to its meaning and scope among the many judges across the nation who have studied § 409, as amended, it would seem extraordinary for this Court now to conclude that the provision complies with *Dole*'s clear-notice requirement.

B. 23 U.S.C. § 409, as amended, is "unrelated 'to the federal interest in particular national projects or programs'"

If this Court were somehow to conclude that § 409, as amended, satisfies *Dole*'s clear-notice requirement, we can only guess as to which interpretations this Court would be more likely to adopt with respect to what we have identified above as the second, third, and fourth ambiguities in the text of § 409. We think it clear, however, that this Court cannot hold § 409, as amended, unambiguous in its entirety without endorsing the broad interpretation of the

first putative ambiguity adopted by the Washington Supreme Court and two-thirds of the other courts to take up the issue. As we explained in (A) above, it simply strains credulity to conclude that the narrower interpretation – adopted only by the concurring justices in *Guillen* and by a small minority of courts to discuss the issue – *is not merely the better interpretation of § 409, as amended, but the unambiguously correct one*. Revealingly, not even the concurring justices in *Guillen* made so strong a claim. Rather, they stated only that "the 1995 amendment *can be logically read*" in the narrower fashion they favored, *Guillen*, 31 P.3d at 657 (M dsen, J., concurring) (emphasis added).

We shall therefore assume *arguendo* that this Court holds that § 409, as amended, is not impermissibly unambiguous and that the privilege applies even to documents or data that were not compiled for a statutorily specified purpose so long as the document or datum is at some subsequent point "compiled or collected" pursuant to the federal scheme. If this is what § 409, as amended, means, however, we believe that this Court must agree with the Washington Supreme Court that the condition fails *Dole*'s "relatedness" requirement.

Dole's spending power doctrine requires that conditions on federal grants not be "unrelated 'to the federal interest in particular national projects or programs'," 483 U.S. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). In *Dole*, the majority stated that it had not yet been necessary for the Court to "define the outer bounds of [this] 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power," 483 U.S. at 209 n.3. The *Dole* Court elaborated on this requirement only insofar as it quoted with approval the Court's 1958 statement that "the Federal Government may establish and impose reasonable conditions relevant to federal interests in the project and

to the overall objectives thereof," *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958).

More recently, the Court has described this requirement as mandating only that conditions on the receipt of federal funds "bear *some relationship* to the purpose of the federal spending," *New York v. United States*, 505 U.S. 144, 167 (1992) (emphasis added), "otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority," *id.*

The federal interest to be served by the federal funds on which § 409, as amended, is a condition on receipt is clear: increasing highway safety. "Section 409 forms part of a comprehensive federal plan to promote highway . . . safety," *Dowell v. Louisiana*, 750 So.2d 498, 500 (La. App. 2000). Section 409 is a subsection of Chapter 4 of Title 23, which is titled "Highway Safety," and Chapter 4 originated as the Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (1966). The core provision of Chapter 4 is § 402, which requires each state to establish a "highway safety program" that is "designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom."

Thus, in order to withstand scrutiny under existing doctrine, § 409, as amended, must "bear some relationship to," *Dole*, 483 U.S. at 207, or not be "unrelated to," *New York*, 505 U.S. at 167, increasing highway safety. In fact, however, § 409, if construed as the Washington Supreme Court majority construed it, is logically at odds with the federal interest in increasing highway safety.

There is no evidence – neither prior to 1987, when § 409 was originally adopted, nor prior to 1995, when it was amended – that Congress or the Secretary of Transportation withheld any portion of a state's allotment of federal highway safety funds for non-compliance with § 152 or any of the other provisions of federal law specified

in § 409. Thus, we are left to assume that all of the states were receiving the federal funds and spending them on projects reasonably expected to increase highway safety. Given this state of affairs, the privilege afforded by § 409 was not needed to increase highway safety by increasing state participation in the federal highway safety scheme since there was already apparently 100% participation. It is possible, however, that the privilege afforded by § 409 would increase the willingness of localities within each state to provide the state the data necessary for the state to spend its annual allotment of federal highway safety funds more efficiently.

Absent federal highway funding, state and local governments can be presumed to have two principal incentives for improving the safety of their own roads. The first is the interest in protecting their citizens from all the physical and economic harms associated with vehicular accidents. The second, for entities that do not enjoy or have waived sovereign immunity, is the fear of being held liable in tort for any negligence that might be found causally responsible for the accidents. Of course, resources being limited, states and localities likely could not make all the safety improvements they might desire. Nonetheless, these considerations would generally be adequate to incentivize state and local governments to investigate how to prioritize safety needs most efficiently.

To understand how those pre-existing incentives affect a locality's interest in receiving Federal funding for road safety improvements, consider § 152 to which § 409, as amended, explicitly applies. Under § 152(a), as it read in 1995 when the amendment to § 409 was adopted, states are obligated to identify "high-hazard" highway locations and, *inter alia*, "assign priorities for the correction of such locations." A specified total amount of federal monies is appropriated each year for the states' hazard-elimination projects. *Id.* § 152(e). Pursuant to § 152(e), these federal

funds are to be apportioned among the participating states substantially in proportion to the population of each state, *id.* § 402(c). Within each state, its share of the total appropriation of federal funds is to be spent on hazard-elimination projects of the state's choosing, with the federal monies covering 90 percent of a selected project's cost. *Id.* § 152(d). Thus, the only competition for federal highway-hazard-elimination funds would occur within each state, with each state the judge of that internal competition for its share of federal funds. Because a successful application for a share of the state's allotment of federal funds would enable a locality to improve the safety of its highways at least in part with federal dollars, localities would have a good reason to participate aggressively.

There is a countervailing consideration, however. Without a privilege for the efforts undertaken for the purpose of trying to secure a share of the state's allotment of federal funds, the fear of increased tort liability might threaten to take away what the carrot of federal funds provided. That is, a locality might decide not to undertake the efforts necessary to develop a potentially successful funding proposal out of concern that doing so would build a record that would make it more susceptible to successful negligence suits if its application for highway-safety funds were not approved and the proposed safety improvement therefore not made. *See, e.g., Rodenbeck v. Norfolk & W. Ry.*, 982 F. Supp. 620, 624 (N.D. Ind. 1997) (observing that if a government "knows that its candid efforts at persuasion" to secure federal safety-enhancement funds "may ultimately be used against it, [that government] will be far less forthcoming in offering any 'data' by which that discretion can be exercised, and indeed may choose not to offer safety suggestions at all").

Conditioning federal funding for projects on the nondiscoverability and inadmissibility of any work product

created "for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossing . . . or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds," 23 U.S.C. § 409, thus plausibly promotes highway safety by eliminating one consideration that might deter local governments from competing vigorously for their state's allotment of federal dollars. Of course, the state would still spend its total allotment of federal highway-safety funds on road-safety improvement projects even if some localities sat out the competition or participated only half-heartedly. But the state would presumably spend its allotment of funds less efficiently, buying a smaller overall increase in safety, than if all localities put forth their best efforts at identifying the most dangerous locations.

Put another way, § 409 would provide the political subdivisions of the states an incentive – if a state were simply unwilling to impose, or unable successfully to enforce, a state-wide mandate to this effect – to gather and provide the state the information it might need to increase the likelihood that the state's allotment of federal highway safety funds was spent in the most effective possible way. This would *perhaps* yield a greater increase in highway safety than would have been obtained if the same funds were spent on different safety-improvement projects. To the extent that § 409, as amended, extends a privilege to documents created in order to help the state maximize the effectiveness of its expenditure of federal highway-safety funds, it is arguably related to the relevant federal interest of increasing highway safety.

But the privilege afforded by § 409, as amended – as interpreted by the Washington Supreme Court – goes farther than this. It ensures, recall, not merely that a locality that develops an application for a share of its

state's federal safety-improvement funds will be *no more* susceptible to successful damage suits as a result of having sought the federal funding than if it had not, but that it will be substantially *less* susceptible to such suits. The broad privilege that the Washington Supreme Court read § 409, as amended, to afford thus *reduces* one of the incentives that operate to encourage state and local governments improve the safety of their highways: the threat of tort liability.

Furthermore, the broad reading of § 409 provides no countervailing increase in highway safety. After all, so long as a locality is made no more susceptible to damage suits by applying for federal funding, then it should be fully incentivized to do so by the prospect that a successful application would result in its own roads being made safer – a consequence that would itself reduce the locality's potential exposure in tort by reducing the number and seriousness of accidents.

In sum, then, to the extent that the § 409 privilege extends to documents and data that would have existed in the absence of the federal funding scheme, and that would not have been privileged in the absence of § 409, it diminishes the ability of individuals to successfully sue the state or its political subdivisions for hazardous road conditions, relative to the state of affairs that would exist if the § 409 privilege did not extend so far. This diminished likelihood of success means that the states will face a reduced incentive to devote their *own* funds to increasing highway safety as a means of precluding such potentially costly suits. At the same time, extending the privilege to these original documents – as distinct from a compilation of them, or a report summarizing them – does not enable the state to spend its allotment of *federal* highway-safety funds more effectively or efficiently.

That is, the state receives and spends the same amount of federal highway-safety funds, and spends those funds in exactly the same way, as it would have if the privilege did not extend to materials and data that would have existed and have been discoverable in the absence of the federal funding scheme. Thus, by extending the privilege this far, Congress clearly diminished – perhaps into non-existence – one important force for increased highway safety within the state while providing no countervailing increase in highway safety relative to the level that would have been obtained with a narrower § 409 privilege. The net result will be a certain decrease in highway safety, per state and thus nationally. Such an outcome is obviously antithetical to – and therefore not appropriately "related to" – the federal interest in *increased* highway safety at the center of the federal funding scheme of which § 409, as amended, is a part.

II. 23 U.S.C. § 409, as amended, exceeds Congress's power under the Commerce Clause

No matter how this Court ultimately resolves the various ambiguities in § 409, as amended, discussed above, enactment of that provision was not within Congress's power under the Commerce Clause.

With its decision in *United States v. Lopez*, 514 U.S. 549, 558 (1995), this Court made clear that there are only "three broad categories of activity that Congress may regulate under its commerce power." And only one of those categories is even potentially relevant with regard to § 409, as amended, which, under the interpretation most favorable to Congress, seeks to regulate the rules of evidence to be applied in state court civil proceedings involving causes of action brought solely under state law.

Under *Lopez*, "Congress may regulate the use of the channels of interstate commerce," 514 U.S. at 558.

Congress also "is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," *id.* Section 409 in its pertinent part, however, does not seek to regulate in either of these permissible areas. Rather, it seeks to regulate the rules of evidence to be applied in state court civil proceedings involving causes of action brought solely under state law.

In addition, the *Lopez* Court held that "Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce," *id.* at 558-59. The Court elaborated on this test: "[w]here *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained," *id.* at 560 (emphasis added); *United States v. Morrison*, 529 U.S. 598, 611 (2000) ("[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.").

Thus, in order for the Court to find that § 409, as amended, is authorized by this aspect of the *Lopez* test, this Court would need to hold that litigation of state court civil proceedings involving causes of action brought solely under state law is an "economic activity" that "substantially affects interstate commerce," *id.* at 560. It is noteworthy in this regard, that the scant legislative history of § 409, as amended, contains no congressional findings on this issue. *See id.* at 563 (stating that the existence of such findings may enable the Court "to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye"); *Morrison*, 529 U.S. at 612 (same).

Further, although one might contend that *some* civil litigation for money damages is, under certain circumstances, "economic activity," it is far less clear that *all* such civil litigation in state court involving causes of action brought solely under state law is "economic activity" that "substantially affects interstate commerce," *id.* at 560. There is no obvious principled basis on which this Court could distinguish the state court litigation covered by § 409 from all other state court civil litigation for money damages. Thus, in order to find that § 409 is within Congress's Article I commerce power, this Court must be willing to hold that *all* civil litigation for money damages in state court involving causes of action brought solely under state law is "economic activity" that "substantially affects interstate commerce," *id.* at 560.

To so hold, would require this Court to "pile inference upon inference" with the effect of eradicating any "distinction between what is truly national and what is truly local," *id.* at 567-68. This Court wisely declined to head down this path in *Lopez*, *id.* at 567-68, and, later, *Morrison*, 529 U.S. at 615-19, and has no reason to change course here.

Such a change of course would be particularly troubling here because it would seemingly eradicate any limitation on federal power in regulating state court judicial proceedings involving causes of action brought solely under state law. This Court has clearly held that Congress may regulate state court procedure with regard to *federal* causes of action brought in state court, *see,* e.g., *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361 (1952); *Felder v. Casey*, 487 U.S. 131, 138 (1988). This Court has also repeatedly observed, however, that

> we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion."

Patterson v. New York, 432 U.S. 197, 201 (1977), quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *see also Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (a state "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Felder*, 487 U.S. at 138 ("No one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts."). Further, this Court in *Lopez* cautioned that it is particularly important for limitations on federal power to be maintained "in areas . . . where States historically have been sovereign," 514 U.S. at 564.

For this Court to hold that *all* civil litigation in state court involving causes of action brought solely under state law is "economic activity" that "substantially affects interstate commerce," *id.* at 560, would effectively sanction intolerably broad federal regulatory power over this core locus of traditional state sovereignty.

III. 23 U.S.C. § 409, as amended, is an unconstitutional intrusion upon state sovereignty

Opponents of states' rights who are nonetheless eager to protect individual rights often fail to understand or acknowledge that our Constitution protects states' rights solely in order to protect individual rights. As this Court has repeatedly observed,

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or

> even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

New York v. United States, 505 U.S. 144, 181 (1992) quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)); *see also Lopez*, 514 U.S. at 576 (Kennedy, J., concurring); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) ("The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties'.") (quoting *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)); *Morrison*, 529 U.S. at 616 n.6.

It is precisely because the protection of states' rights is not an end unto itself that the states do not have the power to authorize otherwise-unconstitutional encroachments upon state sovereignty:

> Where Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the "consent" of state officials. An analogy to the separation of powers among the branches of the Federal Government clarifies this point. The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.

New York, 505 U.S. at 182; *see also* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 129 (2001) (discussing *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Myers v. United States*, 272 U.S. 52 (1926), in which the Court invalidated

legislation that limited the President's authority with regard to certain appointments, even though the President signed the legislation, because the legislation unconstitutionally "infringed on Presidential authority").

This concern with the role of state autonomy in protecting the rights of individuals is what has caused this Court repeatedly to emphasize the important role of federalism in ensuring that both state and federal officials remain accountable to the people. *See New York*, 505 U.S. at 168; *Printz v. United States*, 521 U.S. 898, 920 (1997); *Lopez*, 514 U.S. at 576-77 (Kennedy, J., concurring). "Federalism serves to assign political responsibility, not to obscure it." *FTC v. Ticor Tile Ins. Co.*, 504 U.S. 621, 636 (1992).

It is therefore important to understand that this case is fundamentally about obscuring political responsibility at the expense of individuals' rights under state law.

Consider again the example of Washington State. Prior to Congress's enactment of § 409 in 1987, the state had waived its sovereign immunity with regard to tort claims brought against the state, and no state law privilege existed with regard to the types of materials and data later protected by § 409. This strongly suggests that the people of Washington wanted a tort system under which individuals could bring suit against the state "for damage arising out of its tortious conduct to the same extent as if it were a private person or corporation." Wash. Sess. Laws 1961, ch. 136. Presumably the people of Washington appreciated that this potential tort liability would both provide the state an important incentive to prevent or mitigate conditions that might render the state liable, and ensure that those wrongfully injured by the state would receive just compensation.

During this period, nothing other than the perceived preference of Washington voters presumably precluded

Washington legislators from enacting an exception to the existing waiver of sovereign immunity that would have had the same import as § 409. Similarly, the Washington legislature was free to take appropriate measures to create an evidentiary privilege in state court proceedings identical to that created by § 409. The fact that Washington legislators did neither of these things suggests that they judged that their political fortunes would not be enhanced by such legislation. It also strongly suggests that they (or the people of Washington) did not believe such enactments were likely to increase highway safety within the state of Washington.

With the enactment of § 409 and its amendment, however, Congress was able to blur "the boundaries between the spheres of federal and state authority" such that "political responsibility would become illusory," *Lopez*, 514 U.S. at 577. The Washington legislature could now claim that Congress had put it to a terrible dilemma of abiding by the presumably unpopular § 409 privilege or losing 100% of its annual allotment of federal highway safety funds. At the same time, Washington's representatives in Congress could avoid responsibility by claiming that the federal legislation left to the state legislature the final decision of whether to accept the federal funds given the condition imposed by § 409.

Because of this tendency of conditional offers of federal funds to the states to diminish political accountability by blurring the boundaries between federal and state authority, this Court must be vigilant in its review of such legislation. Here, for example, there is simply nothing to recommend the condition on federal funds imposed by § 409, as amended. The condition does not further, and is indeed antithetical to, the federal interest at stake. The condition interferes in an area long understood to be integral to state sovereignty. And the condition is one whose enactment the Washington legislature – and any

other state legislature – could have independently sought as a matter of state law at any time between the enactment of the Federal Highway Safety Act of 1966 and the adoption of § 409 in 1987.

One is therefore left with the uneasy feeling that the primary accomplishment of § 409, as amended, was to obscure political responsibility for imposing on the people of the states a drastic change in state law of which they were known not to approve, and that would sacrifice existing individual rights under state tort and criminal law.

CONCLUSION

Today, the spending power stands as the great gap in this Court's "federalist revival," a gap with the undisputed potential to nullify our Constitution's critical "distinction between what is truly national and what is truly local," *Lopez*, 514 U.S. at 567-68. *See* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1920 (1995) (observing that if the Spending Clause is "interpreted to permit Congress to seek otherwise forbidden regulatory aims indirectly through a conditional offer of federal funds to the states, the notion of 'a federal government of enumerated powers' will have no meaning"); Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAPMAN L. REV. 195, 195 (2001) ("The greatest threat to state autonomy is, and has long been, Congress's spending power.").

Notwithstanding this Court's careful delineation in *Dole* of the requirements that must be met for conditional offers of federal funds to the states to pass constitutional muster, the *Dole* doctrine is generally perceived as having no bite. *See, e.g.*, Richard A. Epstein, *Bargaining with the State* 156-57 (1993) (contending with regard to *Dole* that "any constitutional challenges to the conditions attached to federal grants are hopeless under the current law," and describing "the basic pattern of the [post-*Dole*] cases" as

"clear and inexorable"); William Van Alstyne, *"Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law*, 16 HARV. J.L. & PUB. POL'Y 303, 319 (1993) (observing that *Dole* "evidently puts federalism under the discretion of Congress"). This conclusion is not unwarranted in light of this Court's failure ever to hold that a conditional offer of federal funds to the states did not survive scrutiny under *Dole*.

As the above analysis demonstrates, § 409, as amended, cannot survive scrutiny under *Dole*. Further, it does not fall within the scope of Congress's power under the Commerce Clause, nor is it consistent with the concern for political accountability that underlies much of this Court's recent federalism jurisprudence.

Thus, this case provides this Court an exceedingly appropriate opportunity – that it may not again soon have – to make clear that the spending power does not provide Congress an eternally available means of circumventing those limitations on Congress's other Article I powers that this Court has recognized and that the Framers of our Constitution intended.

The import of this case is potentially as great as that of this Court's extraordinarily important decision in *Lopez*. For while *Lopez* signaled that the "federalist revival" would begin in earnest, the invalidation of § 409, as amended, would significantly narrow the one remaining – and potentially eviscerative – "loophole" in this Court's important project of restoring a meaningful balance between the state and federal spheres.

Respectfully submitted,

LYNN A. BAKER
Counsel of Record
MITCHELL N. BERMAN
727 E. Dean Keeton Street
Austin, Texas 78705
(512) 232-1325

(20)

Supreme Court, U.S
FILED

AUG 19 2002

CLERK

No. 01-1229

In The
Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, LEGAL GUARDIAN OF JENNIFER GUILLEN AND ALMA GUILLEN, MINORS, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF AMICI CURIAE ROBERT AND LUANN WHITMER IN SUPPORT OF RESPONDENTS

WIGGINS LAW OFFICES, P.L.L.C.
CHARLES K. WIGGINS*
KENNETH W. MASTERS
241 Madison Avenue No.
Bainbridge Island, WA 98110
(206) 780-5033

STRITMATTER KESSLER WHELAN WITHEY COLUCCIO
KEITH L. KESSLER
GARTH L. JONES
413 – 8th Street
Hoquiam, WA 98550
(360) 533-2710

DAVIES PEARSON, P.C.
RICHARD H. BENEDETTI
920 Fawcett – P.O. Box 1657
Tacoma, WA 98401
(253) 572-3052
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

31 pp

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
A. The Commerce Clause Does Not Sustain Section 409 Because The Statute Does Not Regulate Commerce But Instead Regulates State Court Judges And State Officials In A Manner Insufficiently Related To Interstate Commerce	4
1. Section 409 Does Not Regulate "Commerce" Or Any Activity "Among The Several States"	5
2. Section 409 Lacks Any Express Jurisdictional Link To Interstate Commerce, Lacks Congressional Findings Of Such A Link, And Has Only The Most Attenuated Factual Link With Interstate Commerce	9
3. Section 409 Cannot Be Justified As An Integral Part Of The Highway Safety Act Of 1973	14
4. Section 409 Is Only "Integral" To A Statutory Scheme That Impermissibly Attempts To Directly Regulate The States	15
B. Section 409 Is Not Authorized By The Spending Clause Because: (1) It Is Not A Condition On Spending; (2) It Is Impermissibly Coercive; And (3) The 10th Amendment Provides An Independent Bar To Congressional Interference With Washington Citizens' Decision To Waive Sovereign Immunity And Subject Their Governments To Suit On The Same Terms As Any Washington Citizen	17
CONCLUSION	27

TABLE OF AUTHORITIES

Page

FEDERAL CASES

F.E.R.C. v. Mississippi, 456 U.S. 742 (1982) 15

Fullilove v. Klutznick, 448 U.S. 448 (1980) 18

Gregory v. Ashcroft, 501 U.S 452 (1991)..... 6

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).....6, 7

Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981) 6, 7, 14, 15

Katzenbach v. McClung, 379 U.S. 294 (1964) 6, 10

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).....5, 6, 7, 9, 10

New York v. United States, 505 U.S. 144 (1992).....16, 24

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981).....18, 19, 20

Perez v. United States, 402 U.S. 146 (1971) 6, 7

Printz v. United States, 521 U.S. 898 (1997).....16, 17

South Dakota v. Dole, 483 U.S. 203 (1987).....*passim*

Steward Machine Co. v. Davis, 301 U.S. 548 (1937).....22

Testa v. Katt, 330 U.S. 386 (1947).....17

United States v. Bass, 404 U.S. 336 (1971) 10

United States v. Butler, 297 U.S. 1 (1936).....24

United States v. Lopez, 514 U.S. 549 (1995).....*passim*

United States v. Morrison, 529 U.S. 598 (2000) .....*passim*

Wickard v. Filburn, 317 U.S. 111 (1942)..... 9

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

Diversified Investment v. DSHS, 113 Wn.2d 19, 775 P.2d 947 (1989).....22

Whitmer et al. v. Yuk, et al., Washington Supreme Court No. 69327-7 .....1, 2

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 1.....3, 17

U.S. Const. art. I, § 8, cl. 3.....3, 5

U.S. Const. art I, § 8, cl. 18..... 3

STATUTES

18 U.S.C. § 922(q) 7

23 U.S.C. § 131.....20

23 U.S.C. § 136.....20

23 U.S.C. § 152.....*passim*

23 U.S.C. § 158.....18, 20, 22

23 U.S.C. § 159.....20

23 U.S.C. § 161.....20

23 U.S.C. § 402.....20

23 U.S.C. § 409.....*passim*

30 U.S.C. § 1201 *et seq*.....15

42 U.S.C. § 1983.....18

42 U.S.C. § 6000 *et seq*.....18

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 6010 ..... 18, 19, 20

Public Utility Regulatory Policies Act of 1978 15

STATE STATUTES

RCW 4.92.090 26

RCW 4.96.010 26

RCW 47.04.050-.070 21

Wash. Laws 1917, Ch. 76 §§ 1, 5 21

Wash. Laws 1961, Ch. 13 21

Wash. Laws 1984, Ch. 7 §§ 86, 87 21

MISCELLANEOUS

Alexis de Tocqueville, Democracy In America, Vol. 1, Ch. 5, at 61-63 (Vintage, Bradley, ed., 1945) 25

Washington State Const., art. I, § 1 26

David Engdahl, *The Spending Power*, 44 Duke L. Rev. 1, 34-37 (1994) 25

John C. Eastman, *Spending Clause Symposium: Restoring the "General" to the General Welfare Clause*, 4 Chapman L. Rev. 63 (2001) 25

Low-Level Radioactive Waste Policy Amendments Act of 1985 16

INTEREST OF AMICUS CURIAE[1]

Robert and Luanne Whitmer, individually and as guardians of Shana, Hanna and Denel Whitmer, were the plaintiffs in *Whitmer et al. v. Yuk, et al.*, Washington Supreme Court No. 69327-7. The Whitmers' case was consolidated with the Guillens' case and this certiorari proceeding is taken from the decision of the Washington Supreme Court in both cases.

This amicus brief is limited to the power or lack of power of Congress to enact 23 U.S.C. § 409. In contrast to the Guillens' and fellow amici's briefs, this brief argues that § 409 is unconstitutional no matter how narrowly the Court construes it. It views Congress' statutory scheme as a whole, and from the perspective of the citizens of a state.

The Whitmers have argued that § 409 is unconstitutional at every stage of these proceedings, unlike the Guillens, who did not raise the issue in the trial court or the State Court of Appeals. Pet. Br. 11-14. The Whitmers' constitutional challenge prompted the Washington Supreme Court to call for supplemental briefing on the issue from both parties after the cases were consolidated. *Id.* at 13-14. The Washington Supreme Court considered the facts of the Whitmer case as well as the Guillen case in rendering its decision. Thus, the facts of and arguments raised in both cases are woven into the fabric of this case and cannot be unravelled.

---

[1] No counsel for a party authored any part of this brief, nor did any person or entity other than the Whitmers and their counsel contribute monetarily to the preparation or submission of this brief.

The Guillen and Whitmer document requests are quite different. The Guillens chose to write narrow document requests and did not seek discovery of any documents protected by 23 U.S.C. § 409. Guillen Br. in Opp. at 1. In contrast, the Whitmers broadly requested any documents relating to accidents at the site, whether or not those documents were protected by § 409. Whitmer Br. in Opp. 4-5. Moreover, in the *Guillen* case, Pierce County had actually applied for federal funding for improvements at the accident intersection. Pet. App. A, 59-61. By contrast, the intersection in the *Whitmer* case had never been the subject of an application for federal funds under 23 U.S.C. § 152. *Id.*

Petitioner settled with the Whitmers and argued to this Court that the Whitmers are not parties to this certiorari proceeding. Pet. Resp. in Opp. To Whitmer Mot. To be Deemed Parties. The Whitmers noted that they invested substantial resources in persuading the Washington State Supreme Court that § 409 is unconstitutional. The settlement should have brought an end to the litigation, but it did not. Petitioner County continues to attack the decision rendered by the Washington State Supreme Court in the Whitmers' case as well as the Guillens' case. The Whitmers are interested in defending the decision rendered in their case for the benefit of all persons who may be injured in the future on negligently designed and maintained roads.

This Court held that the Whitmers are not parties, but may file a brief as amicus curiae. Order of 6/3/02. In addition, letters of consent to the Whitmers' participation as amici have been filed with this Court.

SUMMARY OF ARGUMENT

Congress did not have the power under the Constitution to enact 23 U.S.C. § 409. The proposed sources of power are the Commerce Clause and the Spending Clause, each as augmented by the Necessary and Proper Clause. U.S. Const. art. I, § 8, cl. 1, 3, 18. The latter clause only applies if the former clauses do, and neither of them authorizes § 409.

The parties and amici have suggested that § 409 be interpreted broadly (Petitioner, Amicus State of Louisiana, Amicus Association of American Railroads) or narrowly (Respondents Guillen, Amicus Washington State Trial Lawyers Association Foundation), or simultaneously narrowly and broadly (United States), and that it is ambiguous (Respondents Guillen). Both the broad and narrow constructions suffer from the same lack of congressional power.

Section 409 is not authorized by the Commerce Clause because it does not "regulate Commerce . . . among the several States. . . . " U.S. Const. art. I, § 8, cl. 3. Instead, § 409 regulates non-commercial, non-economic activity – the discovery and admission into evidence in state court proceedings on state court claims of state-generated documents. The state court proceedings and the documents protected are inherently intrastate, do not travel in and are not part of interstate commerce. Section 409 lacks any jurisdictional element that might tie its restrictions into interstate commerce.

Commerce Clause legislation may only regulate commerce by operating upon the citizens of the states. But this statutory scheme, especially sections 152 and 409, operates directly on the states and their judges. It thus

fails Commerce Clause scrutiny for this independently sufficient reason.

Nor does the Spending Clause justify § 409. Congress can "encourage" the states to adopt a particular statute or regulation by conditioning the receipt of federal funding on a state's voluntary adoption of the requirement. But § 409 is the antithesis of a condition to be accepted or rejected; it categorically requires states to deny discovery or admission into evidence of particular documents "notwithstanding any other provision of law. . . . " Section 409 is a stick, not a carrot, and fails Spending Clause scrutiny for this reason alone. Moreover, § 409's unconditional nature impermissibly coerces the States' participation, and encroaches far into truly local matters, reaching beyond the "general welfare" and into the sole purview of the States.

Therefore, the Court should hold § 409 unconstitutional.

ARGUMENT

A. The Commerce Clause Does Not Sustain Section 409 Because The Statute Does Not Regulate Commerce But Instead Regulates State Court Judges And State Officials In A Manner Insufficiently Related To Interstate Commerce.

Section 409 cannot be sustained as an exercise of the Commerce Clause. Petitioner County, the United States, and the amici supporting Petitioner fail to analyze § 409

under this Court's most recent cases on the Commerce Clause, *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000).[2] Amici States do not even argue that § 409 can be sustained under the Commerce Clause. Thus, not one of the 196 pages of briefs submitted by Petitioner, the United States, and their amici even attempts to sustain § 409 under the *Lopez/Morrison* analysis. Those (and many more) cases make clear that a statute like § 409 has never fallen within Congress' Commerce Power.

On the contrary, § 409 is far more offensive to our federalism than the laws stricken in *Lopez* and *Morrison*: At least in those cases, Texas and Virginia could carry out their own gun possession and rape laws despite the federal law. The effect of § 409, however, is to displace Washington's law, without providing a federal remedy.

1. Section 409 Does Not Regulate "Commerce" Or Any Activity "Among The Several States."

The Commerce Clause empowers Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . . " U.S. Const. Art. I, § 8, cl. 3. Since at least *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), intrastate

[2] *Lopez* and *Morrison* are cited by Petitioner and its amici only for the long-established principle that the Commerce Clause permits commerce to regulate channels and instrumentalities of interstate commerce, as well as activities substantially related to interstate commerce. Pet. Br. 3; PLAC Amicus Br. 6, 8; AAR Amicus Br. 24. The United States cites *Lopez* for the same proposition and to demonstrate the Guillens' standing to challenge § 409. U.S. Br. 25, 42.

activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" have been within Congress' power to regulate. Yet at the same time, "the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Lopez*, 514 U.S. at 557 (*quoting Jones & Laughlin*, 301 U.S. at 37). Thus, to safeguard the promise of liberty harbored in our dual system of government, *see Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991), this Court has long "undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Lopez*, 514 U.S at 557 (*citing Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280 (1981); *Perez v. United States*, 402 U.S. 146, 155-156 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-253 (1964)).

Under this analysis, and in light of the intergovernmental structure created by the Constitution, many cases have established that Congress may: (1) "regulate the use of the channels of interstate commerce"; (2) "regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "regulate those activities having a substantial relation to intrastate commerce . . . i.e., those activities that substantially affect intrastate commerce." *Lopez*, 514 U.S. at

558-59 (*citing, inter alia, Jones & Laughlin, Hodel, Perez* and *Heart of Atlanta, supra*).

Applying this well established analysis, this Court noted in *Lopez* that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), must be analyzed under the third category of congressional power because it did not regulate the use of the channels of interstate commerce or protect an instrumentality of interstate commerce or a thing in interstate commerce. 514 U.S. at 559. Similarly, § 409 regulates the admission and discovery of documents in court proceedings. It does not regulate channels of interstate commerce, instrumentalities of interstate commerce or things of interstate commerce. Thus, "consistent with the great weight of [this Court's] case law, . . . the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." 514 U.S. at 559.

The Court concluded in *Lopez* that § 922(q) was simply a criminal statute that "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. The Court similarly concluded in *Morrison* that, "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." 529 U.S. at 613. The Court in *Morrison* went on to consider whether gender-related violence might still be regulated under the Commerce Clause on the theory that the cumulative effect of gender-related violence substantially affects commerce. The Court declined to adopt a "categorical rule against aggregating the effects of any noneconomic activity", 529 U.S. at 613, but ultimately rejected the argument that "Congress may regulate noneconomic, violent criminal conduct based

solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617.

Applying this Court's well-established Commerce Clause analysis, § 409 simply does not purport to regulate commercial or economic activity. Discovery of documents and admission of evidence in a court proceeding is not a commercial or economic activity. The administration of justice has not been an article of commerce since the barons gathered at Runnymede to force King John to renounce the sale of right or justice. There can be no commercial trade or bargaining in civil discovery or the administration of trial. The administration of justice is simply not a commercial or economic activity, whether one adopts a narrow interpretation of the commerce clause, 514 U.S. at 584 (Thomas, J., concurring), or a broad view, 514 U.S. at 628-29 (Breyer, J., dissenting).

Indeed, § 409 is even farther removed from commercial or economic activity than the Gun-Free School Zones Act struck down in *Lopez*. After all, the purchase and transportation of guns is in fact commercial activity, 514 U.S. at 603 (Stevens, J., dissenting), whereas the documents at issue in § 409 were not introduced into commerce, do not come from a commercial source, and do not move in commerce.

Not only does § 409 fail to regulate commercial or economic activity, but it fails to regulate activity "among the several states." The conduct of state court proceedings is inherently and inescapably intrastate. Nor can the discovery and admission into evidence of particular documents be aggregated in a way that substantially affects commerce. *Lopez*, 514 U.S. at 559-60. In some cases, this Court has held that Congress can regulate intrastate

activity where the aggregate of all such activity substantially affects interstate commerce, *id.*, because each intrastate transaction substitutes for a potential interstate transaction. For instance, in *Jones & Laughlin,* the Court concluded that "industrial labor relations [could not] constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war." 301 U.S. at 41. Similarly, in *Wickard v. Filburn*, 317 U.S. 111 (1942), "which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S. at 560, the Court concluded that homegrown wheat "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market" and "in this sense competes with wheat in commerce." 317 U.S. at 128.

By contrast, discovery and admission of documents in State court proceedings never "aggregate" to become a substitute for interstate activity. Litigation over an automobile accident is inherently local. The respondents' requested discovery of accident records from Petitioner County does not in any sense substitute for the discovery of accident records from Oregon, Idaho or any other state. Thus, § 409 not only fails to regulate commerce, it fails to regulate any activity "among the several states."

2. Section 409 Lacks Any Express Jurisdictional Link To Interstate Commerce, Lacks Congressional Findings Of Such A Link, And Has Only The Most Attenuated Factual Link With Interstate Commerce.

In addition, § 409 lacks any of the three additional indicia of substantial effects on interstate commerce

recognized in this Court's precedents: an express jurisdictional element linking the facts of the case to interstate commerce; congressional findings of a link with interstate commerce; and a factual link between the regulated activity and interstate commerce. *See Lopez*, 514 U.S. at 561-64 (*citing, inter alia, United States v. Bass*, 404 U.S. 336 (1971); *McClung*, 379 U.S. at 304; *Perez*, 402 U.S. at 156; *Jones & Laughlin*, 301 U.S. at 37); *Morrison*, 529 U.S. at 613-16 (citing these and other cases).

The Court noted in *Lopez* that the Gun-Free School Zones Act lacked any express jurisdictional element "which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." 514 U.S. at 562. Similarly, in *Morrison*, the Court noted that the Violence Against Women Act of 1994 lacked any express link with interstate commerce. 529 U.S. at 613. So too, § 409 lacks any requirement that the documents or information which may not be discovered or admitted into evidence are linked in any way to interstate commerce. Indeed, the facts of these cases belie such a link. The Guillen collision occurred at a local intersection in unincorporated Pierce County. Pet. App. A-5-6. Pierce County is 150 miles from Oregon, the closest neighboring state, and 250 miles from Idaho, the only other state bordering Washington. Nothing in the record suggests that anyone involved in the collision was traveling in interstate commerce. The Court may take judicial notice that the intersection of 168th Street East and B Street East in Pierce County is approximately 4 miles from the nearest federal highway, Interstate 5. *See*

Washington State Department of Transportation Highway Map, Puget Sound North.[3]

Similarly, nothing in the Whitmer case suggests that anyone involved in the Whitmer collision was traveling in interstate commerce. Pet. App. A. 16. The Whitmers' complaint alleged that the plaintiffs and defendants were all residents of the State of Washington, and defendants City of Lakewood, Pierce County and City of Tacoma, are all municipal corporations under the laws of the State of Washington. Whitmer Clerk's Papers 538. The Court may take judicial notice that the intersection of 75th and Custer Road in Lakewood, Washington, is approximately one mile from the nearest federal highway, Interstate 5. WSDOT Map, supra.[4]

Not only does § 409 lack any jurisdictional link to interstate commerce, much of the information shielded by § 409 clearly has nothing to do with interstate commerce. Section 409 shields documents and data compiled or collected pursuant to 23 U.S.C. § 152. Section 152 directs the states to identify obstacles and hazards which may be a danger to any motorist, bicyclist, or pedestrian. Section 152(a)(1). Funds are authorized for expenditure on bicycle or pedestrian pathways or trails, as well as public roads. Section 152(c). Obviously, the vast majority of bicyclists and pedestrians are not involved in interstate commerce,

---

[3] http://www.wsdot.wa.gov/Communications/Map/Map-Quadrant-PDFs/enlargements/PugetSoundN.pdf. Although not marked on this map, the intersection is located just below the name "Spanaway" in the lower center portion of the map.

[4] Although not marked, the intersection is just above the name "Lakewood."

but purely intrastate activities. Nor are the documents withheld under §409 linked in any way to interstate commerce. Nothing in the record supports the conclusion that any of the 56 accident reports withheld in the Whitmer case, Pet. App. A-18, are linked in any way with interstate commerce. Nor is there any indication that the private traffic impact analysis for a Chevron Station and a McDonald's restaurant, also withheld in the Whitmer case, Pet. App. A-19, are linked in any way to interstate commerce. Nor did Petitioner or the City of Lakewood ever apply for federal funds to improve the intersection where the Whitmers' children were injured.

Nor did Congress hold hearings or make findings that the discovery or admission of the documents referenced in § 409 were substantially related to interstate commerce. No hearings or findings support any link between § 409 and interstate commerce. Petitioner and the United States point to terse statements of Congressional intent, to a statement in a brief by the United States as amicus curiae in a case in which this Court denied certiorari, Pet. Br. 4-5, U.S. Br. 3-4, and to an internal memorandum from the Department of Transportation. La. Amicus Br. App. These brief comments are not Congressional findings and do not even assert that there is a link between § 409 and interstate commerce.

Finally, the link between the regulated activities and interstate commerce is far too attenuated. For example, several chains of linkage were suggested in *Lopez*: (1) possession of a firearm in a school zone may result in violent crime, violent crime imposes costs on society, through the mechanism of insurance those costs are spread throughout the population, and, violent crime reduces the willingness of individuals to travel, 514 U.S.

at 563-64; (2) guns in schools threaten the educational process, reducing productivity, which adversely affects the national economic well-being. 514 U.S. at 564. This Court rejected these attenuated chains of reasoning because they inevitably lead to the conclusion that any activity can be linked to the Commerce Clause, and swallow up the sovereignty of the states in such traditional areas as the police power and family law. 514 U.S. at 564. The Court rejected a similarly attenuated chain of reasoning in *Morrison*. 529 U.S. at 615-16.

The chain of reasoning argued by Petitioner and the United States between Section 409 and interstate commerce is even more attenuated than those rejected in *Lopez* and *Morrison*. They argue: (1) discovery and admission of the § 409 documents and data could lead to increased litigation and higher verdicts in highway safety lawsuits; (2) this specter would deter state officials from participating in the federal program or they "might not be optimally thorough and candid in doing so"; (3) federal funds therefore will be used less effectively to improve safety; (4) the misapplication of funds will result in decreased safety and increased accidents; (5) which will "literally impede the flow of interstate commerce." Pet. Br. 27-29, U.S. Br. 41-42.

The supposed chain between § 409 and interstate commerce is both longer and weaker than the chains found insufficient in *Lopez* and *Morrison*. Equally importantly, if Petitioner's chain of argument is sufficient to justify regulation under the Commerce Clause, then Congress' powers to regulate commerce are virtually unlimited. Under Petitioner's reasoning, by virtue of the Commerce Clause Congress could tell the States how their police officers must fill out, maintain and file accident reports for

every local auto collision in the United States, on the theory that such uniformity would help prevent auto accidents in interstate commerce. On a similar basis, Congress could establish specifications for every city road and country lane, set speed limits everywhere, impose a national motor vehicle code and rules of the road, establish driver's license requirements, regulate all aspects of civil service touching upon highway design, totally preempt state automobile liability law, establish a national traffic police force, or require that all automobile accident cases be litigated in a federal forum. The Court should reject these highly attenuated and hypothetical chains of causation.

3. Section 409 Cannot Be Justified As An Integral Part Of The Highway Safety Act Of 1973.

Unable to justify § 409 under this Court's precedents, Petitioner and its amici suggest that § 409 should be upheld as an "integral part" of a larger regulatory scheme:

> A complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid Congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.

Pet. Br. 33, AAR Amicus Br. 22, PLAC Amicus Br. 8-9 (*quoting Hodel,* 452 U.S. at 329 n. 17 (1981)). But § 409 fails even the *Hodel* test.

Petitioner's "integral part of the regulatory program" argument comes from a footnote in *Hodel*, 452 U.S. at 329 n. 17, which is later repeated in *F.E.R.C. v. Mississippi*, 456 U.S. 742, 757 n. 22 (1982). This footnote, on which this Court has apparently not relied in the 20 years since *F.E.R.C.*, was a *dictum* in *Hodel* and in *F.E.R.C.* The *Hodel* footnote follows eight pages of detailed analysis of 21 different provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* 452 U.S. at 321-29. The Court had already held that the district court erred in holding these 21 provisions unconstitutional, finding the district court's rationale "untenable," 452 U.S. at 323, finding "little difficulty in concluding that the Congressional finding in this case satisfied the rational-basis test," 452 U.S. at 325, and holding that the district court erred in ruling that the 21 challenged provisions were not reasonably related to the legitimate goal of protecting interstate commerce. 452 U.S. at 327. Similarly, in *F.E.R.C.*, the Court carefully analyzed the three challenged provisions of the Public Utility Regulatory Policies Act of 1978, 456 U.S. at 746-757, "readily conclud[ing] that the District Court's analysis and the appellees' arguments are without merit so far as they concern the Commerce Clause." 456 U.S. at 753. Thus, even under *Hodel* and *F.E.R.C.*, the Court should analyze the statutory provision centrally challenged in this case, § 409.

4. Section 409 Is Only "Integral" To A Statutory Scheme That Impermissibly Attempts To Directly Regulate The States.

It does not help Petitioner to argue that § 409 is "integral" to 23 U.S.C. § 152 because § 152 itself cannot be

justified under the Commerce Clause. Section 152 operates directly on the states, and not on the citizens of the states, when it unambiguously requires state officials to take particular actions: "Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements. . . . " Pet. App. J 2-3, § 152(a)(1). Section 152 thus runs afoul of the well-established principle that Congress may not regulate the states directly under the Commerce Clause. *See, e.g., Printz v. United States*, 521 U.S. 898, 923-24 (1997); *New York v. United States*, 505 U.S. 144, 166 (1992).

In *New York*, this Court first distinguished its somewhat "unsteady" line of precedent concerning statutes that subject states to generally applicable laws because certain provisions of the Act in question (the Low-Level Radioactive Waste Policy Amendments Act of 1985) purported to directly regulate the states. 505 U.S. at 160-61. Similarly, § 152 commands the states, and only the states, to comply with its requirements. It simply commandeers state officers to do Congress' bidding. But *New York* holds that Congress has no power to commandeer state officers in this manner. 505 U.S. at 175-76. *Printz* also holds that Congress may not commandeer state officers to perform federal program requirements. 521 U.S. at 933. Simply put, the "Federal Government may not compel the states to enact or administer a federal regulatory program." *Printz*, 521 U.S. at 933 (*quoting New York*, 505 U.S. at 188). That is precisely the problem with Congress' scheme under §§ 152 and 409.

Indeed, § 409 itself operates directly on states through their judges, requiring them to deny discovery or admission of documents gathered for § 152 purposes. But § 409

goes far beyond other federal statutes that merely require state judges to enforce federal laws. *See, e.g., Printz*, 521 U.S. at 906-07. The valid federal laws cited in *Printz* imposed primary duties on citizens, requiring state judges to enforce them under the Supremacy Clause. For instance, the Courts of Rhode Island could not decline to entertain an action to recover damages for a substantive violation of the Federal Emergency Price Control Act. *Testa v. Katt*, 330 U.S. 386 (1947). Here, by contrast, Congress does not purport to regulate any form of interstate commerce under § 409 or § 152, but rather has issued free-standing directives to state judges, telling them how they are to enforce the laws and rules of their own states in cases that lack any connection to interstate commerce. Congress thus goes too far.

B. Section 409 Is Not Authorized By The Spending Clause Because: (1) It Is Not A Condition On Spending; (2) It Is Impermissibly Coercive; And (3) The 10th Amendment Provides An Independent Bar To Congressional Interference With Washington Citizens' Decision To Waive Sovereign Immunity And Subject Their Governments To Suit On The Same Terms As Any Washington Citizen.

Section 409 is not authorized by the Spending Clause, U.S. Const. art. I, § 8, cl. 1, for several reasons. First, § 409 is not a Spending Clause statute because it does not purport to give the states the choice of accepting or rejecting particular conditions on the availability of federal funding; *a fortiori*, Congress has not unambiguously conditioned the State's receipt of funds. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987). Second, if § 409 is read

as a condition on funding, the only possible interpretation of it would be that the Secretary could cut off all federal highway funds for noncompliance, rendering § 409 impermissibly coercive. *Id.* Third, § 409 does not affect the "general welfare" but rather runs aground on an independent bar – the Tenth Amendment – which forbids congressional interference with Washington citizens' decision to waive sovereign immunity and subject their governments to suit on the same terms as any Washington citizen. *Id.*

Dole considered the constitutionality of 23 U.S.C. § 158, which directed the Secretary of Transportation to withhold a portion of federal highway funds from states that permitted persons under the age of 21 to purchase and publicly possess any alcoholic beverage. The Court observed that "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal monies upon compliance by the recipient with federal statutory and administrative directives.'" *Dole*, 483 U.S. at 206 (*quoting Fullilove* [*v. Klutznick*], 448 U.S. [448] at 474 [1980]). *Dole* reiterated, however, that the "spending power is of course not unlimited, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, and n. 13 (1981), but is instead subject to several general restrictions articulated in our cases." 483 U.S. at 207.

As a threshold matter, *Pennhurst* explains why § 409 is not a Spending Clause statute. There, the Court considered whether the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (42 U.S.C. § 6000 *et seq.*) created rights privately enforceable under 42 U.S.C. § 1983. The Court held that the statute at issue (42 U.S.C. § 6010) was not a "condition" on federal spending because

neither the section nor the Act permitted the Secretary to terminate funding for failure to comply with the terms of § 6010. *Pennhurst*, 451 U.S. at 13 ("Noticeably absent from § 6010 is any language suggesting that § 6010 is a 'condition' for the receipt of federal funding under the Act"); 23 ("If funds cannot be terminated for a State's failure to comply with § 6010, § 6010 can hardly be considered a 'condition' of the grant of federal funds."). Moreover, § 6010 stood "in sharp contrast" to other sections of the Act, which required various actions "as a condition of" receiving federal funds. 451 U.S. at 12-13.

Just as in *Pennhurst*, § 409 lacks any language suggesting that it is a "condition" on federal funding:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected . . . pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence . . . .

23 U.S.C. § 409. Nothing in this section (or in any other portion of Title 23) purports to condition all or any portion of federal highway funds on a state's acquiescence in § 409. Nowhere does Congress require or permit the Secretary to cut off any or all federal funding when, as

here, a state chooses to permit discovery and admission of documents collected pursuant to § 152.[5]

This stands in sharp contrast to other portions of Title 23, which (for instance) expressly (1) require the states to enact or enforce legislation or regulations regarding some behavior (*e.g.*, teenage drinking and driving or highway junkyards); (2) condition funding on compliance; and (3) specify what portion of federal funds the Secretary may withhold due to noncompliance. *See, e.g.*, 23 U.S.C. §§ 131, 136, 158, 159, 161. Section 409 does none of these things. Thus, like § 6010 in *Pennhurst*, § 409 is not a condition on spending.

Section 409 also contrasts sharply with 23 U.S.C. § 402. Section 409 deals with data collected or compiled under the hazard elimination program of § 152, while § 402 deals with collection of data on traffic-related deaths and injuries. Section 402(a) directs the Secretary of the Department of Transportation to "establish a highway safety program," and for the states to collect and report such data as the Secretary may require. Section 402(c) authorizes funds for such a program, and directs the Secretary to withhold funds from any state that does not implement a highway safety program. Section 402(k) prohibits the admission into evidence of § 402 documents. Section 409 contrasts sharply with § 402 by not giving the states any option to refrain from participation in the hazard elimination program of § 152, and therefore by not

[5] Petitioner cites several cases that have found a congressional "intent" to condition funding on § 409, but neither those cases nor the Petitioner cites to any language in Title 23 to support that supposition. *See* Pet. Br. at 25-26.

authorizing the Secretary to withhold any funds from non-compliant states – under § 409, the states have no option but to comply.

By the same token, among the four "general restrictions" on the spending power noted in *Dole*, the second one requires "that if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously. . . .'" *Dole*, 483 U.S. at 207-08 (citations omitted). Since § 409 is not a condition on spending and contains no conditional language as discussed above, *a fortiori* it does not unambiguously condition Washington's receipt of federal funds on changing its discovery and evidence rules. Section 409 thus fails *Dole*'s second restriction.[6]

Furthermore, even if § 409 had been unambiguously conditioned on state acceptance, as an historical and legal matter Petitioner and its amici are incorrect to suggest that the Washington Legislature has "accepted" § 409. *See, e.g.*, Pet. Br. at 3, 6, 8 & 27; U.S. Br. at 43. Our Legislature has never accepted § 409 (enacted in 1987) because RCW 47.04.050 through .070 (accepting conditions on federal highway funds) were first enacted in 1917[7] and most recently amended in 1961 and 1984.[8] Under Washington

[6] Indeed, even § 152 does not unambiguously impose a condition on funding. While § 152(d) mentions that the federal government will provide 90% of the funds for approved highway safety improvement projects, it nowhere states that some or all of these funds may be withheld if a state fails to comply with § 152's requirements that the state survey "all public roads" and identify dangers to motorists, bicyclists and pedestrians throughout the state. 23 U.S.C. § 152(a)(1). Nothing in Title 23 makes § 152 a condition on spending.

[7] Wash. Laws 1917, Ch. 76 §§ 1, 5.

[8] Wash. Laws 1961, Ch. 13; 1984, Ch. 7 §§ 86, 87.

law, our Legislature cannot prospectively accept congressional conditions on federal funding. *Diversified Investment v. DSHS*, 775 P.2d 947, 950 (1989) ("It is well settled in Washington that the Legislature may not constitutionally attempt to adopt future federal law by statute.") For this Court to hold otherwise would permit Congress to undermine Washington citizens' ability to hold their legislators accountable by permitting state legislatures to prospectively pass the buck or, more accurately, take the buck and pass the blame, to the federal government. Accordingly, even if § 409 had been written as an unambiguous condition on the receipt of federal funds, the Washington Legislature never accepted the condition, and the Spending Clause cannot authorize Petitioner to withhold relevant documents in discovery.

The lack of any conditional language in or about § 409 leads to a second reason that it cannot be sustained under Congress' spending power: coercion. *Dole* notes that this Court's "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (*quoting Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). This Court concluded in *Dole* that Congress' unambiguous threat (in 23 U.S.C. § 158) to cut off only 5% of federal highway funds if a state did not pass a minimum age drinking law did not amount to compulsion because the states retained the option of saying no and because only 5% could be withheld. 483 U.S. at 211-12.

Unlike § 158, § 409 gives the states no opportunity to say no. The same is true of 23 U.S.C. § 152(a)(1): the states *shall* collect and compile the necessary data. States are not asked or "encouraged" to pass a law, they are

simply told that they may not enforce discovery requests or admit documents collected or compiled for § 152 purposes in their courts. Moreover, these statutes contain no limitations or directions on how much money the Secretary may withhold when, as here, a state concludes that such documents shall be discoverable and admissible in its courts. In light of Congress' utter lack of direction, the Secretary might well feel bound to withhold every penny of federal highway funds until a state buckles under this oppressive congressional command. Both § 409 and § 152 are impermissibly coercive in violation of the states' sovereignty over truly local matters. *See Dole*, 483 U.S. at 211-12.

The third reason that the spending power cannot sustain § 409 is this: control of discovery and admissibility of state-generated documents in state courts on state tort claims is so intrinsically "local" that it does not fall within the "general welfare" for which Congress may expend money, but rather is among the powers retained by the States under the Tenth Amendment. This conclusion follows from two related restrictions on the spending power:

> [T]he exercise of the spending power must be in pursuit of "the general welfare." In considering whether a particular expenditure is intended to serve general public purposes, "courts should defer substantially to the judgment of Congress. . . ." Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

Dole, 483 U.S. at 207-08 (citations omitted). As applied here, these two restrictions are "mirror images" of one another because that which is outside the general welfare

is reserved to the States or to the people under the Tenth Amendment:

> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

New York v. United States, 505 U.S. 144, 156 (1992).

In addressing the "general welfare" restriction on the spending power, *Dole* notes that the "breadth of this power was made clear in *United States v. Butler*, 297 U.S. 1, 66 (1936) . . . . " 483 U.S. at 207. In *Butler*, this Court did not fully limn the scope of "the general welfare", but rather looked to the Tenth Amendment as its limit:

> We are not now required to ascertain the scope of the phrase "general welfare of the United States" or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. . . .
>
> From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited.

297 U.S. at 68 (citations omitted). Under this analysis, *Butler* struck down the Agricultural Adjustment Act of 1933. Thus, *Butler*'s holding on the breadth of spending power is that the Tenth Amendment prohibits federal spending laws that invade the reserved powers of the States.

As *Dole* notes, however, *Butler* also says that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." 483 U.S. at 207, 213 (O'Connor, J., dissenting). As noted above, the holding in *Butler* does not follow from this statement. *See also, e.g.*, David Engdahl, *The Spending Power*, 44 Duke L. Rev. 1, 34-37 (1994) (*Butler* actually adopted Madison's view of the limited spending power, albeit while saying that it was following Hamilton). *Butler*'s very Madisonian view of the Spending Clause (*i.e.*, that "general welfare" only means national welfare) also predominated throughout the first 85 years of the Nation's history. *See, e.g.*, John C. Eastman, *Spending Clause Symposium: Restoring the "General" to the General Welfare Clause*, 4 Chapman L. Rev. 63 (2001); *see also* Alexis de Tocqueville, *Democracy In America*, Vol. 1, Ch. 5, at 61-63 (Vintage, Bradley, ed., 1945) (explaining that in the 1830's, "the Federal government . . . is the exception; the government of the states is the rule."). Thus, *Butler* correctly interpreted the original intent of the Constitution's framers as prohibiting Congress from invading the province of the States through the spending power.

As in *Butler*, then, the Tenth Amendment provides an independent bar to the so-called condition in § 409. The Tenth Amendment reserves the "powers not delegated to the United States by the Constitution . . . to the States . . .

or to the people." U.S. Const., amend. X (emphasis ours). Yet Petitioner and its amici argue that § 409 is a federal "privilege" applicable in state court to cases under state law, designed to benefit state and local governments. *See, e.g.*, States' Amicus Br. 15; U.S. Br. 46.

"The Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. It is difficult to conceive of a more truly local matter than the terms and conditions under which a State is willing to waive its sovereign immunity. Washington's Constitution derives all political power from the people of Washington, subjects all governmental entities to their consent, and establishes those entities to protect and maintain their individual rights:

> All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

Washington State Const., art. I, § 1. Exercising their plenary power through their Legislature, the people of Washington have waived the sovereign immunity of all state and local governmental entities for tortious governmental conduct. RCW 4.92.090 (state); RCW 4.96.010 (local governmental entities). As relevant here, the people have thus determined that Petitioner "shall be liable for damages arising out of [its] tortious conduct . . . to the same extent as if [it] were a private person or corporation." RCW 4.96.010.

No decision of this Court sanctions so severe an imposition of federal power on truly local matters. The Congress thus has no power to regulate discovery or admissibility of documents in this purely local dispute,

rewrite state civil court rules, impose federal privileges in state-law-based actions against state actors, or to abrogate Washington citizens' decisions to waive sovereign immunity and subject its governments to suit in state court on the same terms and conditions as any citizen.

CONCLUSION

Amici Whitmer respectfully submit that the Washington State Supreme Court correctly concluded that the 1995 amendment to § 409 is unconstitutional. But the State Supreme Court erroneously concluded that the pre-1995 § 409 passes constitutional muster. This statute cannot be sustained under the Commerce Clause, the Spending Clause, or the Necessary and Proper Clause and should be stricken in its entirety.

Respectfully submitted,

KEITH L. KESSLER
GARTH L. JONES
STRITMATTER KESSLER WHELAN WITHEY COLUCCIO
413 - 8th Street
Hoquiam, WA 98550
(360) 533-2710

RICHARD H. BENEDETTI
DAVIS PEARSON, P.C.
920 Fawcett
P.O. Box 1657
Tacoma, WA 98401
(253) 572-3052

*CHARLES K. WIGGINS
KENNETH W. MASTERS
WIGGINS LAW OFFICES, P.L.L.C.
241 Madison Avenue North
Bainbridge Island, WA 98110
(206)780-5033

**Counsel of Record*